



September 29, 2021

Mr. Kris Cook  
Department of Finance  
915 L Street, 10th Floor  
Sacramento, CA 95814

Ms. Theresa Dunham  
Kahn, Soares & Conway, LLP  
1415 L Street, Suite 400  
Sacramento, CA 95814

*And Parties, Interested Parties, and Interested Persons (See Mailing List)*

**Re: Decision**

*California Regional Water Quality Control Board, Los Angeles Region,  
Order No. R4-2010-0108, 11-TC-01*

California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2010-0108, NPDES Permit No. CAS00-4002, Adopted July 8, 2010; Public Information and Participation Program: Parts 4.C.2(c)(1)(C), 4.C.2(c)(2),(6),(8), 4.C.2(d), 4.C.3(a),(b); Reporting Program and Program Effectiveness Evaluation: 4.I.1; 3.E.1(e); Special Studies: 4.E.III.3(a)(1)(D-E); Attachment F, Section F, Part 4.E.IV.4; Part 4.E.III.2(c)(3)-(4); Watershed Initiative Participation: Part 4.B; Vehicle and Equipment Wash Areas: Part 4.G.1.3(a); and Illicit Connection/Illicit Discharge Elimination: Part 4.H.1.3(a).

County of Ventura and Ventura County Watershed Protection District, Claimants

Dear Mr. Cook and Ms. Dunham:

On September 24, 2021, the Commission on State Mandates adopted the Decision dismissing the Test Claim on the above-captioned matter.

Sincerely,

Heather Halsey  
Executive Director

BEFORE THE  
COMMISSION ON STATE MANDATES  
STATE OF CALIFORNIA

IN RE TEST CLAIM

California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2010-0108, NPDES Permit No. CAS00-4002, Adopted July 8, 2010<sup>1</sup>

Public Information and Participation Program: Parts 4.C.2(c)(1)(C), 4.C.2(c)(2),(6),(8), 4.C.2(d), 4.C.3(a),(b); Reporting Program and Program Effectiveness Evaluation: 4.I.1; 3.E.1(e); Special Studies: 4.E.III.3(a)(1)(D-E); Attachment F, Section F, Part 4.E.IV.4; Part 4.E.III.2(c)(3)-(4); Watershed Initiative Participation: Part 4.B; Vehicle and Equipment Wash Areas: Part 4.G.1.3(a); and Illicit Connection/Illicit Discharge Elimination: Part 4.H.1.3(a)

Filed on August 26, 2011

County of Ventura and Ventura County  
Watershed Protection District, Claimants

Case No.: 11-TC-01

*California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2010-0108*

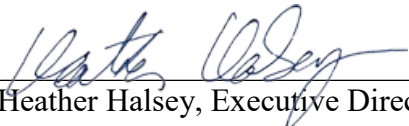
DECISION PURSUANT TO  
GOVERNMENT CODE SECTION 17500 ET  
SEQ.; CALIFORNIA CODE OF  
REGULATIONS, TITLE 2, DIVISION 2,  
CHAPTER 2.5, ARTICLE 7.

*(Adopted September 24, 2021)*

*(Served September 29, 2021)*

**TEST CLAIM**

The Commission on State Mandates adopted the attached Decision on September 24, 2021.

  
\_\_\_\_\_  
Heather Halsey, Executive Director

<sup>1</sup> The city co-permittees specified in the permit include Camarillo, Fillmore, Moorpark, Ojai, Oxnard, Port Hueneme, San Buenaventura (Ventura), Santa Paula, Simi Valley, and Thousand Oaks. Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017 (test claim permit), page 131.

BEFORE THE  
COMMISSION ON STATE MANDATES  
STATE OF CALIFORNIA

IN RE TEST CLAIM

California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2010-0108, NPDES Permit No. CAS00-4002, Adopted July 8, 2010<sup>1</sup>

Public Information and Participation Program: Parts 4.C.2(c)(1)(C), 4.C.2(c)(2),(6),(8), 4.C.2(d), 4.C.3(a),(b); Reporting Program and Program Effectiveness Evaluation: 4.I.1; 3.E.1(e); Special Studies: 4.E.III.3(a)(1)(D-E); Attachment F, Section F, Part 4.E.IV.4; Part 4.E.III.2(c)(3)-(4); Watershed Initiative Participation: Part 4.B; Vehicle and Equipment Wash Areas: Part 4.G.1.3(a); and Illicit Connection/Illicit Discharge Elimination: Part 4.H.1.3(a)

Filed on August 26, 2011

County of Ventura and Ventura County Watershed Protection District, Claimants

Case No.: 11-TC-01

*California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2010-0108*

DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7.

*(Adopted September 24, 2021)*

*(Served September 29, 2021)*

**DECISION**

The Commission on State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on September 24, 2021. Theresa Dunham appeared on behalf of the County of Ventura and Ventura County Watershed Protection District (claimants). Brittany Thompson appeared on behalf of the Department of Finance (Finance). Jennifer Fordyce appeared on behalf of the State Water Resources Control Board. Renee Purdy appeared on behalf of the Los Angeles Regional Water Quality Control Board.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code sections 17500 et seq., and related case law.

The Commission adopted the Proposed Decision to dismiss the Test Claim by a vote of 6-0, as follows:

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<sup>1</sup> The city co-permittees specified in the permit include Camarillo, Fillmore, Moorpark, Ojai, Oxnard, Port Hueneme, San Buenaventura (Ventura), Santa Paula, Simi Valley, and Thousand Oaks. Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017 (test claim permit), page 131.

<b>Member</b>	<b>Vote</b>
Lee Adams, County Supervisor	Yes
Natalie Kuffel, Representative of the Director of the Office of Planning and Research	Yes
Gayle Miller, Representative of the Director of the Department of Finance, Chairperson	Yes
Sarah Olsen, Public Member	Yes
Yvette Stowers, Representative of the State Controller, Vice-Chairperson	Yes
Spencer Walker, Representative of the State Treasurer	Yes

### **Summary of the Findings**

This Test Claim was filed on a National Pollutant Discharge Elimination System (NPDES) stormwater permit, Order No. R4-2010-0108, by the County of Ventura and the Ventura County Watershed Protection District (claimants).<sup>2</sup>

The Commission finds the test claim was not timely filed pursuant to Government Code section 17551(c) and is, therefore, dismissed.

Statutes of limitation do not begin to run until a cause of action accrues, and a cause of action accrues at “the time when the cause of action is complete with all of its elements.”<sup>3</sup> Government Code section 17551(c) provides a period of limitation for test claim filings that states “[l]ocal agency and school district test claims shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later.” Thus, the period of limitation in Government Code section 17551(c) begins to run following the effective date of the statute or executive order, and the claimants have 12 months from that date to file a test claim. That deadline can be extended if the claimants show that costs were first incurred after the effective date of the statute or executive order pled in the claim.

In this case, the test claim permit was adopted on July 8, 2010, and states that it became effective the same date provided that the U.S. Environmental Protection Agency (U.S. EPA) had no

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<sup>2</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 1. The city co-permittees specified in the permit include Camarillo, Fillmore, Moorpark, Ojai, Oxnard, Port Hueneme, San Buenaventura (Ventura), Santa Paula, Simi Valley, and Thousand Oaks. Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 124, 131 (Permit).

<sup>3</sup> *Rubenstein v. Doe No. 1* (2017) 3 Cal.5th 903, 911.

objections.<sup>4</sup> The Test Claim was filed thirteen months after the effective date, on August 26, 2011.<sup>5</sup>

The claimants assert, however, that the Test Claim was timely filed because the effective date of the permit was delayed 50 days (until August 27, 2010) pursuant to the Memorandum of Agreement (MOA) between the State and U.S. EPA.

The Commission finds, based on the administrative records of the Los Angeles Regional Water Quality Control Board (Regional Board) and the State Water Resources Control Board (State Board) (collectively “Water Boards”), that the period of limitation for the permit sections pled by the claimants began to run on August 5, 2009, the effective date of Order No. 09-0057, or at the latest July 8, 2010, the effective date of the test claim permit noticed by the Regional Board, so the test claim filed August 26, 2011, was not timely filed within 12 months following the effective date of the executive order as required by Government Code section 17551(c).

Order No. 09-0057, an executive order within the meaning of article XIII B, section 6 of the California Constitution, was the permit that *first* ordered the requirements that were pled by the claimants, and it was never stayed or vacated by the Regional Board.<sup>6</sup> The Regional Board reconsidered some sections of Order No. 09-0057 when it adopted the test claim permit on July 8, 2010, but did not change the requirements pled by the claimants other than extending some due dates. Thus, even if the test claim permit made the “cause of action . . . complete with all of its elements,” then the period of limitation would have accrued and began to run on July 8, 2010, which was the date noticed by the Regional Board as the effective date of the test claim permit. There is no evidence in the record or in documents publicly available of any notices issued by the Regional Board indicating that the test claim permit had a delayed effective date as asserted by the claimants.

The Commission further finds that the claimants’ reliance on the MOA is misplaced. The claimants rely on the delay provisions of the MOA, arguing that the 21 comments received before the test claim permit was adopted were significant, and that changes were made to the latest version of the tentative permit that were not to accommodate U.S. EPA requests.<sup>7</sup> The claimants assert that either of these required a 50-day delay in the effective date of the permit to

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<sup>4</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 162 (test claim permit, which states in Finding G4, “This Order shall serve as a NPDES permit, pursuant to CWA § 402, and shall take effect on (Order adoption date) provided the Regional Administrator of the U.S. EPA has no objections.”).

<sup>5</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 162 (test claim permit, Finding G4).

<sup>6</sup> *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 919-920 (finding that Government Code section 17516 was unconstitutional to the extent it purports to exempt orders issued by Regional Water Boards from the definition of “executive orders.”).

<sup>7</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 17; Exhibit E, Claimants’ Rebuttal Comments, filed January 2, 2018, pages 3-4.

provide U.S. EPA time to review the permit changes.<sup>8</sup> The claimants also argue that the MOA is an extension of U.S. EPA's authority under the Clean Water Act and so the provisions of the permit cannot "modify or supersede the provisions in the MOA."<sup>9</sup>

The record in this case shows that U.S. EPA was notified of all 21 comments and made no objection to the tentative permit.<sup>10</sup> U.S. EPA fully supported the terms of the tentative permit, as stated in its June 4, 2010 comments.<sup>11</sup> At the July 8, 2010 hearing, a representative from U.S. EPA expressed support for the terms of the permit, as modified by the Regional Board.<sup>12</sup>

More importantly, the MOA is signed by a State and U.S. EPA, committing them to specific responsibilities relevant to the administration and enforcement of the State's regulatory program and U.S. EPA's program oversight under the Clean Water Act and thus, governs "the working relationship between the State and EPA."<sup>13</sup> It is a contract between those parties.<sup>14</sup> The MOA does *not* provide notice to the permittees of the effective date of an NPDES permit, which is required by the Regional Board when it adopts a quasi-judicial order.<sup>15</sup> All notices issued by the Regional Board indicate that the test claim permit became effective on July 8, 2010.<sup>16</sup> There is no evidence in the record or in documents publicly available that the permit had a delayed effective date.

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<sup>8</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 17; Exhibit E, Claimants' Rebuttal Comments, filed January 2, 2018, pages 3-4.

<sup>9</sup> Exhibit E, Claimants' Rebuttal Comments, filed January 2, 2018, page 2.

<sup>10</sup> Exhibit I(1)(k), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Regional Board Memo, July 2, 2010, mailing list, pages 6-7); Exhibit I(1)(l), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Regional Board, Notice of Public Meeting/Hearing, July 8, 2010, pages 7-16).

<sup>11</sup> Exhibit I(1)(m), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (U.S. EPA letter of June 4, 2010, pages 1-2).

<sup>12</sup> Exhibit I(1)(e), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (July 8, 2010 Hearing Transcript, pages 110-113, 155-156).

<sup>13</sup> 40 Code of Federal Regulations, section 123.24; Exhibit A, Test Claim filed August 26, 2011 and revised May 17, 2017, pages 72-73 (Memorandum of Agreement).

<sup>14</sup> *Tyler v. Cuomo* (9th Cir. 2000) 236 F.3d 1124, 1134, analyzing an MOA between U.S. Department of Housing and Urban Development and the City of San Francisco, finding that the MOA is a contract and the City is bound by its terms.

<sup>15</sup> Water Code section 13263(f); *Marathon Oil Co. v. EPA* (1977) 564 F.2d 1253, 1260-1263; *City of Rancho Cucamonga v. Regional Water Quality Control Board* (2006) 135 Cal.App.4th 1377, 1385.

<sup>16</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 162 (test claim permit, Finding G4). Exhibit I(4), Regional Board, Region 4, Adopted Orders [https://www.waterboards.ca.gov/losangeles/board\\_decisions/adopted\\_orders/query.php?id=5894](https://www.waterboards.ca.gov/losangeles/board_decisions/adopted_orders/query.php?id=5894) (accessed April 5, 2021).

Accordingly, this Test Claim is dismissed on the ground that it is not timely filed pursuant to Government Code section 17551(c).

## COMMISSION FINDINGS

### I. Chronology

- 08/05/2009 The order prior to the order adopting the test claim permit (Order No. R4-2009-0057), containing the same activities alleged to be newly mandated in this test claim, became effective August 5, 2009.
- 07/08/2010 The test claim permit (R4-2010-0108) was adopted and states that the permit “shall take effect on (Order adoption date) provided the Regional Administrator of the U.S. EPA has no objections.”<sup>17</sup>
- 08/26/2011 The claimants filed the Test Claim.<sup>18</sup>
- 09/08/2011 The Test Claim was deemed complete.
- 03/03/2017 Commission staff issued the Notice of Incomplete Joint Test Claim Filing following review by legal staff.<sup>19</sup>
- 05/17/2017 The claimants filed their Response to Notice of Incomplete Joint Test Claim Filing and revised the Test Claim.<sup>20</sup>
- 05/26/2017 Commission staff issued the Notice of Complete Joint Test Claim Filing, Removal From Inactive Status, Schedule for Comments, Renaming of Matter, Request for Administrative Record, and Notice of Tentative Hearing Date.
- 08/23/2017 The Regional Board filed the administrative record for the 2001 Los Angeles County MS4 permit.<sup>21</sup>
- 08/23/2017 The State Board filed the administrative record on the 2009 Ventura County MS4 permit.<sup>22</sup>

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<sup>17</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 124, 162 (test claim permit, and Finding G4).

<sup>18</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 1.

<sup>19</sup> Exhibit B, Notice of Incomplete Joint Test Claim Filing, issued March 3, 2017.

<sup>20</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017.

<sup>21</sup> This administrative record for the 2001 Permit is not included as an exhibit to this matter due to its large size (82,219 pages/two gigabytes) which may not be able to be downloaded on many devices and can crash even powerful ones. The Commission’s current regulations, which were not in effect when the record was filed, now specify a maximum file size of 500 megabytes to avoid such file size issues in the future. The entire record may be found on the Commission’s website at <https://www.csm.ca.gov/matters/11-TC-01.php> and must be viewed using Adobe Acrobat or free [Adobe Reader](#).

<sup>22</sup> Exhibit I(5), State Board’s Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017.

- 10/11/2017 The Department of Finance filed comments on the Test Claim.<sup>23</sup>
- 10/12/2017 The Regional Board filed the administrative record for the 2009 Ventura County MS4 permit and 2010 Ventura County MS4 permit.<sup>24</sup>
- 10/30/2017 The Water Boards filed late comments.<sup>25</sup>
- 01/08/2018 The claimants filed rebuttal comments.<sup>26</sup>
- 05/19/2021 Commission staff issued the Draft Proposed Decision.<sup>27</sup>
- 06/09/2021 The Water Boards filed comments on the Draft Proposed Decision and requested postponement of the hearing.<sup>28</sup>
- 06/09/2021 The claimants filed comments on the Draft Proposed Decision and requested postponement of the hearing.<sup>29</sup>

## II. Background

On August 26, 2011, the claimants filed this Test Claim on Order No. R4-2010-0108 (the test claim permit), which was adopted by the Regional Board on July 8, 2010. The permit states that it became effective on the adoption date provided that U.S. EPA had no objections.<sup>30</sup> The claimants plead the following permit provisions, arguing that they impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution:

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<sup>23</sup> Exhibit C, Finance’s Comments on the Test Claim, filed October 11, 2017, page 1.

<sup>24</sup> This administrative record for the 2009 and 2010 Permits is not included as an exhibit to this matter due to its large size (44,080 pages/two gigabytes) which may not be able to be downloaded on many devices and can crash even powerful ones. The Commission’s current regulations, which were not in effect when the record was filed, now specify a maximum file size of 500 megabytes to avoid such file size issues in the future. Relevant excerpts of the administrative record are cited to and included in Exhibit I. The entire record may be found on the Commission’s website at <https://www.csm.ca.gov/matters/11-TC-01.php> and must be viewed using Adobe Acrobat or free [Adobe Reader](#).

<sup>25</sup> Exhibit D, Water Boards’ Late Comments on the Test Claim, filed October 30, 2017, page 1.

<sup>26</sup> Exhibit E, Claimants’ Rebuttal Comments, filed January 2, 2018, page 1.

<sup>27</sup> Exhibit F, Draft Proposed Decision, issued May 19, 2021.

<sup>28</sup> Exhibit G, Water Boards’ Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021.

<sup>29</sup> Exhibit H, Claimants’ Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021.

<sup>30</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 162 (test claim permit, which states in Finding G4, “This Order shall serve as a NPDES permit, pursuant to CWA § 402, and shall take effect on (Order adoption date) provided the Regional Administrator of the U.S. EPA has no objections.”).



- Public Information/Participation Program- Part 4.C.2(c)(1)(C), 4.C.2(c)(2),(6),(8), and 4.C.2(d).; 4.C.3(a),(b).<sup>31</sup> The claimants allege that these sections impose “[n]ew public outreach requirements including: distribution of storm water pollution prevention materials to auto parts stores, home improvement stores, and others; development of an ethnic communities strategy; distribution of school district materials to 50 percent of all K-12 students every two years or development of a youth outreach plan; creation and implementation of a behavioral change assessment; conducting pollutant-specific outreach; conducting corporate outreach; and implementing a business assistance program.”<sup>32</sup>
- Reporting Program and Program Effectiveness Evaluation - Part 4.I.1<sup>33</sup>; Part 3.E.1(e).<sup>34</sup> The claimants contend that these sections impose “[n]ew requirements to develop an electronic reporting program and an electronic reporting format; and, a new requirement to conduct a Program Effectiveness Assessment.”<sup>35</sup>
- Special Studies - Part 4.E.III.3(a)(1)(D-E)<sup>36</sup>; Attachment F, Section F (monitoring)<sup>37</sup>; Part 4.E.IV.4<sup>38</sup>; Part 4.E.III.2(c)(3)-(4).<sup>39</sup> The claimants allege that these sections impose “[n]ew requirements to conduct or participate in special studies to develop tools to predict and mitigate adverse impacts of hydromodification, and to comply with hydromodification control criteria; new requirements to update and expand the technical guidance manual; and, a requirement to develop an off-site mitigation list of sites/locations and schedule for completion of such projects.”<sup>40</sup>

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<sup>31</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 17-18, and 173-175 (test claim permit).

<sup>32</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 17-18.

<sup>33</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 18 and 217 (test claim permit).

<sup>34</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 18 and 170 (test claim permit).

<sup>35</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 18.

<sup>36</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 18 and 190 (test claim permit).

<sup>37</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 18 and 285-286 (test claim permit).

<sup>38</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 18 and 196-197 (test claim permit).

<sup>39</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 18 and 188 (test claim permit).

<sup>40</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 18.

- Watershed Initiative Participation – Part 4.B.<sup>41</sup> The claimants contend that this section imposes “[n]ew requirements to participate in the Southern California Storm Water Monitoring Coalition (“SMC”); SMC Regional Bioassessment Monitoring Program; and, Southern California Bight Projects.”<sup>42</sup>
- Vehicle and Equipment Wash Areas – Part 4.G.1.3(a).<sup>43</sup> The claimants allege that this section imposes a “[n]ew requirement for elimination of wash water discharges from County facilities for Fire Fighting Vehicles.”<sup>44</sup>
- Illicit Connection/Illicit Discharge Elimination – Part 4.H.1.3(a).<sup>45</sup> The claimants contend that this section imposes “[n]ew requirements for mapping the County storm drain system.”<sup>46</sup>

The Test Claim was initially deemed complete. However, upon initial legal review, it was determined that the Test Claim was filed beyond the period of limitation required by Government Code section 17551 because it was filed 13 months after the effective date of the permit and there was no showing that costs were first incurred within twelve months of the filing date. Government Code section 17551(c) states that “[l]ocal agency and school district test claims shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later.” Thus, a notice of incomplete test claim was issued.<sup>47</sup> The claimants responded with a revised filing and legal arguments on the period of limitations issue, which did not include a showing that the claim was filed within twelve months of first incurring costs, but instead argued that the effective date was later than the date indicated in the order itself.<sup>48</sup> The Test Claim was deemed complete so that a full legal analysis on the timeliness of this Test Claim could be considered by the Commission.

### **III. Positions of the Parties**

#### **A. County of Ventura and the Ventura County Watershed Protection District**

The claimants argue that the Test Claim was timely filed because the effective date of the permit was delayed 50 days pursuant to the MOA between the State Water Resources Control Board and the U.S. EPA. The claimants state that Section II.F. of the MOA, attached to the Test Claim,

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<sup>41</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 18 and 171-172 (test claim permit).

<sup>42</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 18.

<sup>43</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 18 and 209 (test claim permit).

<sup>44</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 18.

<sup>45</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 18 and 215-216 (test claim permit).

<sup>46</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 18.

<sup>47</sup> Exhibit B, Notice of Incomplete Joint Test Claim Filing, issued March 3, 2017.

<sup>48</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 2 and 17.

provides that permits become effective 50 days after adoption “where the EPA has made no objection to the permit, if (a) there has been significant public comment, or (b) changes have been made to the latest version of the draft permit that was sent to EPA for review (unless the only changes were made to accommodate EPA comments).”<sup>49</sup> In arguing that the MOA’s 50-day delay applies, the claimants summarize the following events:

On May 5, 2010, the Los Angeles Water Board issued a draft Permit, Notice of Written Public Comment Period and Notice of Public Hearing. The EPA made no objection to the draft Permit as proposed by the Los Angeles Water Board on May 5, 2010, or prior to its adoption on July 8, 2010. There was, however, significant written public comment submitted on or before June 7, 2010, which was the closing date for submittal of written public comments. [citation omitted.]

In all, 21 written comment letters were submitted to the Los Angeles Water Board on or before June 7, 2010, including from diverse interests such as the Natural Resources Defense Council and the Building Industry Association of Southern California. Further, the National Resources Defense Council and the Building Industry Association of Southern California both requested and received Party status in this quasi-judicial proceeding. After the close of the written comment period, and prior to the close of the Public Hearing on July 8, 2010, further revisions were made to the draft Permit that was issued on May 5, 2010. The additional revisions were not the result of requests made by EPA but were due to comments provided by other interested parties. [citation omitted.]

Accordingly, the Permit adopted by the Los Angeles Water Board on July 8, 2010, was subject to significant written public comment and was revised as compared to the version that was sent to EPA on May 5, 2010. Thus, according to the terms of the binding MOA between EPA and the State Water Resources Control Board, the “effective date” of the Permit was “50 days after adoption.” 50 days after the July 8, 2010 adoption date is August 27, 2010. This Test Claim has been timely submitted in that it has been submitted within one year of the effective date of the 2010 Permit.<sup>50</sup>

The claimants further argue that the MOA governs the effective date of the 2010 Permit because the MOA “is an extension of U.S. EPA’s federal authority under the CWA [Clean Water Act],” so the Permit’s stated effective date “cannot modify or supersede the provisions in the MOA.”<sup>51</sup> According to the claimants:

The 1989 MOA provides that final permits adopted by a RWQCB [Regional Water Quality Control Board] become effective on the date of adoption, 50 days after adoption, or 100 days after adoption, depending upon the nature of the permit and the level of

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<sup>49</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 17, 93 (Memorandum of Agreement). The MOA is Exhibit A to the Declaration of Theresa A. Dunham.

<sup>50</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 17.

<sup>51</sup> Exhibit E, Claimants’ Rebuttal Comments, filed January 2, 2018, page 2.

public response to a draft permit. When an individual permit has received significant public comment, or when the final permit has changed from the draft permit sent to U.S. EPA for review other than changes requested by U.S. EPA, that permit “shall become effective on the 50<sup>th</sup> day after the date of adoption,” provided that U.S. EPA has not objected to the permit. [Citation omitted.] This 50-day time period is needed to provide U.S. EPA with adequate time to review a permit that has garnered significant public attention and/or has changed during the approval process. [Citation omitted.]

The 2010 Permit fits both of these criteria, even though only one is necessary to trigger the 50-day time period. First, 21 separate, substantive comments were timely submitted on the 2010 draft permit. [Citation omitted.] Commenters included environmental interest groups and industry groups, and some of those commenters requested and received party status in this proceeding. For instance, the Building Industry Association of Southern California, Building Industry Legal Defense Foundation, and Construction Industry Coalition on Water Quality (collectively, “BIA”) submitted comments on the 2010 Permit that focused on the land development section of the 2010 Permit and its request that the Los Angeles Water Board consider including provisions for bio-infiltration designs for new developments and redevelopment projects, among other possible options for maintaining pre-construction hydrology in developments. [Citation omitted.] A letter submitted by the Oxnard Chamber of Commerce also raised concerns about the 2010 Permit’s treatment of Low Impact Development best management practices, which could impact opportunities for development and redevelopment in the City of Oxnard. [Citation omitted.] This is significant public comment. Second, revisions were made to the draft permit issued on May 5, 2010 to address some of these comments. [Citation omitted.] Thus, the final permit approved by the Los Angeles Water Board on July 8, 2010 had changed from the draft permit sent to U.S. EPA for review on May 5, 2010, and those changes were not to address U.S. EPA comments. [Citation omitted.] Therefore, the 2010 Permit could not become effective before the U.S. EPA was provided the appropriate time for review as mandated by the MOA – meaning that the permit did not become effective on the date of the Los Angeles Water Board’s adoption of the permit, but 50 days after the date of adoption pursuant to the provisions of the 1989 MOA.

The fact that the 2010 Permit is a continuation of Order Number 09-0057 (2009 Permit) does not change this analysis. Initially, the 2009 Permit was appealed to the SWRCB for review by the BIA, which challenged the adoption of the 2009 Permit based on late changes to the permit that were not provided to the public for review and comment. After the Los Angeles Water Board agreed to a voluntary remand of the 2009 Permit, it opened the permit up to public comment on a new tentative version of the permit. As mentioned above, during this reconsideration, the tentative 2010 Permit received significant public comment from stakeholders, several of which urged that the Los Angeles Water Board modify the permit from the version adopted in 2009. This created great uncertainty for the Claimants, because they did not know which provision the Los Angeles Water Board may or may not change, and which comments from the public it would choose to address and incorporate.

. . . The Los Angeles Water Board retained total discretion to alter any provision in its reconsideration of the 2009 Permit and ultimate adoption of the 2010 Permit. Therefore,

filing a test claim on the 2009 Permit, while the permit was actively being reconsidered by the Los Angeles Water Board would have been premature because the specific mandates in the permit reasonably could have changed upon reconsideration.<sup>52</sup>

In comments on the Draft Proposed Decision, the claimants argue that the 2009 Permit (Order No. 09-0057) was not properly adopted until after it was reconsidered and re-adopted by the Regional Board as the 2010 Permit, so the 2009 Permit is irrelevant to the period of limitation in Government Code section 17551(c). The claimants also reiterate the argument that the 2010 Permit took effect on August 27, 2010 and so the claimants' Test Claim, filed August 26, 2011, was timely filed.<sup>53</sup> In arguing the 2009 Permit's lack of relevancy to the period of limitation, the claimants contend:

Reconsideration [of the 2009 Permit] was necessary "in light of substantial new information submitted, confusion regarding the record, and other procedural irregularities" in connection with the adoption of the 2009 Permit, but the State Board could not complete its own review within the statutory deadline. [citations omitted.] The Regional Board accepted the State Board's request to remand the matter, thereby negating the need for the State Board to order a stay of the 2009 Permit. The issue for reconsideration was whether to affirm the initial adoption of the 2009 Permit, strongly suggesting the 2009 Permit and its provisions were invalid until they were properly re-adopted on July 8, 2010, after the Regional Board adhered to notice and comment requirements. This is evidenced by the Regional Board's Notice of Public Hearing dated May 5, 2010, which indicates the 2009 Permit was treated as an "original draft permit" being considered for adoption on July 8, 2010.<sup>54</sup>

The claimants also allege that the 2010 Permit was adopted as a reconsideration of the 2009 Permit rather than an amendment or modification, arguing:

If the State and Regional Boards (Water Boards) sought only a narrow modification of the 2009 Permit, as suggested by Staff, revocation and reissuance of the permit would have been unnecessary. (Draft Decision, p. 37.) Therefore, the 2010 Permit is neither a modification of the 2009 Permit nor a completely new permit. Instead, the Regional Board effectively converted the 2009 Permit into the 2010 Permit after the State Board called for its reissuance. (40 C.F.R. § 122.62 ["When a permit is revoked and reissued, the entire permit is reopened and subject to revision and the permit is reissued for a new term."].) Accordingly, the

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<sup>52</sup> Exhibit E, Claimants' Rebuttal Comments, filed January 2, 2018, pages 3-4.

<sup>53</sup> Exhibit H, Claimants' Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 2.

<sup>54</sup> Exhibit H, Claimants' Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 3.

2009 Permit no longer has any significance as an official or applicable permit under the Clean Water Act.<sup>55</sup>

Additionally, the claimants assert that Order 09-0057 is irrelevant for purposes of timeliness under Government Code section 17551(c) because that statute “hinges on the effective date of the executive order being pled for reimbursement.” The claimants filed their Test Claim on the final 2010 Permit, an “executive order” with its own effective date for purposes of section 17551(c).<sup>56</sup> According to the claimants:

That the final 2010 version of the permit imposes requirements originally found in the 2009 version of the permit is irrelevant for purposes of section 17551(c) because the 2009 version was in reality determined by the Water Boards to not be properly adopted and was rescinded in its entirety by the Regional Board upon reconsideration.<sup>57</sup>

The claimants assert that the fact that the reconsideration was narrow in scope, allowing only limited comments and evidence, “does not change this analysis.”<sup>58</sup> And the claimants contend that filing the Test Claim during reconsideration would have been premature because specific mandates in the permit reasonably could have changed upon reconsideration.<sup>59</sup>

The claimants also disagree with the Draft Proposed Decision’s characterization of the MOA as a contract governing the relationship between the State and U.S. EPA because doing so “severely oversimplifies the nature of the MOA and its legal effect on the issue presented.”<sup>60</sup> The claimants describe the MOA as “a delegation of EPA’s statutory power governing the issuance of NPDES permits as required by the Clean Water Act” that “controls the distribution of NPDES program responsibilities between the EPA, the State Board, and Regional Boards, including EPA’s review and comment on draft and adopted permits.”<sup>61</sup> The claimants maintain that the MOA delays the effective date of an adopted permit by 50 days if (1) EPA does not object to the

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<sup>55</sup> Exhibit H, Claimants’ Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 3.

<sup>56</sup> Exhibit H, Claimants’ Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, pages 3-4.

<sup>57</sup> Exhibit H, Claimants’ Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 4.

<sup>58</sup> Exhibit H, Claimants’ Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 4.

<sup>59</sup> Exhibit H, Claimants’ Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 4.

<sup>60</sup> Exhibit H, Claimants’ Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 5.

<sup>61</sup> Exhibit H, Claimants’ Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 5.

permit and (2) the permit has garnered significant public comment and/or has changed during the approval process. The claimants argue that the 2010 Permit fits both of these criteria.<sup>62</sup>

In disputing the conclusion that the MOA does not provide notice regarding the effective date of the permit, the claimants argue that the Draft Proposed Decision “ignores the MOA’s control over the effective date and EPA’s right to review a permit beyond its adopted date.”<sup>63</sup> Because EPA made no objections, the claimants maintain that the permit became effective on August 27, 2010, even though various permit provisions have specific effective dates tied to the permit’s adoption date. According to the claimants, the Regional Board’s failure to identify the Permit’s proper effective date in accordance with the MOA “cannot operate to override the requirements of the Clean Water Act.”<sup>64</sup>

The claimants further argue that if NPDES permit provisions are inconsistent with federal law, the contrary permit provisions are superseded by federal law. And because the MOA is an extension of EPA’s statutory authority under the Clean Water Act, the MOA has a similar effect on permit provisions that conflict with its plain meaning. Thus, the claimants conclude that the language declaring that the permit “shall take effect on (order adoption date) provided the [U.S. EPA] has no objections” is invalid to the extent that it conflicts with the MOA regarding the effective date of the Permit. Moreover it leads to absurd retroactive results and procedural confusion by “requiring the permit to take effect before EPA has time to meaningfully consider the proposal and make objections, undermining the intent and purposes of the MOA.”<sup>65</sup>

#### **B. Department of Finance**

Finance’s comments address the merits of the Test Claim. Finance “believes claimants do have stormwater fee authority undiminished by Propositions 218 or 26.”<sup>66</sup> Finance also argues that claimants have fee authority under their police power for alleged mandated permit activities regardless of whether the fees receive voter approval pursuant to Proposition 218, and Proposition 26 (which excludes assessments and property-related fees imposed in accordance with Proposition 218 from the definition of taxes (art. XIIC, §1(e)(7))). Citing *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, Finance asserts that claimants can choose “not to put a fee to the voters, or the voters can reject the fee, but not at the state’s expense,” and sufficient fee authority exists regardless of political feasibility.<sup>67</sup> Finance defers to the Water Boards on whether the Permit imposes a new program or higher level of service and the impact

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<sup>62</sup> Exhibit H, Claimants’ Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 5.

<sup>63</sup> Exhibit H, Claimants’ Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 6.

<sup>64</sup> Exhibit H, Claimants’ Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 6.

<sup>65</sup> Exhibit H, Claimants’ Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 7.

<sup>66</sup> Exhibit C, Finance’s Comments on the Test Claim, filed October 11, 2017, page 1.

<sup>67</sup> Exhibit C, Finance’s Comments on the Test Claim, filed October 11, 2017, pages 1-2.

of the Supreme Court's decision in *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749.<sup>68</sup> Finance did not file comments on the Draft Proposed Decision.

### C. Water Boards

In their comments on the Test Claim, the Water Boards argue that the Commission does not have jurisdiction over the Test Claim (filed August 26, 2011 and revised May 17, 2017) because it was not filed within 12 months of the effective date of the Permit (effective July 8, 2010). The Water Boards maintain that reliance on the MOA is incorrect because the Permit states it “shall take effect on (Order adoption date) provided the Regional Administrator of the U.S. EPA has no objections.” And there is no dispute that the Permit was adopted on July 8, 2010 and U.S. EPA did not object to the Permit.<sup>69</sup> According to the Water Boards:

The Los Angeles Water Board's decision to have the 2010 Permit take effect immediately upon adoption was intentional. Claimants' reliance on the NPDES MOA between U.S. EPA and the State Water Board is also entirely misplaced as it ignores the context in which the Order was adopted. As described in Section II.C., above, the Los Angeles Water Board specifically declined to stay certain provisions of the 2009 Permit, stating “until the Los Angeles Water Board takes further action on the Ventura County MS4 Permit (which is currently scheduled for July 8, 2010), *the existing permit, including all of its provisions, remain in full force and effect.*” [citation omitted.] It was not necessary for the Board to delay the effective date of the 2010 Permit as the requirements in the 2010 Permit are virtually the same as those in the 2009 Permit. Thus, the Permittees had been subject to those same provisions since the effective date of the 2009 Permit and had already been implementing the provisions and, notably, incurring costs to implement those provisions. Moreover, the reconsideration of the permit in 2010 was to allow public comment on the very language that the Permittees, NRDC, and Heal the Bay proposed and advocated for.

. . . To the extent that Claimants believe the Los Angeles Water Board's established effective date was contrary to the NPDES MOA with U.S. EPA, Claimants could have raised this issue before the Los Angeles Water Board and, if dissatisfied with the response, filed a petition with the State Water Board challenging the effective date. [Wat. Code, § 13320.] It did neither. The Commission is not the proper forum for Claimants to challenge the effective date.<sup>70</sup>

The Water Boards further argue: (1) the Regional Board found that the Permit provisions were required by Federal law, which findings are entitled to deference under *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749; (2) U.S. EPA has required similar provisions in its Permits; (3) the claimants could have sought substitute best management practices but have not exhausted their administrative remedies for doing so; (3) the challenged

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<sup>68</sup> Exhibit C, Finance's Comments on the Test Claim, filed October 11, 2017, page 1.

<sup>69</sup> Exhibit D, Water Boards' Late Comments on the Test Claim, filed October 30, 2017, page 14.

<sup>70</sup> Exhibit D, Water Boards' Late Comments on the Test Claim, filed October 30, 2017, page 15.



permit does not impose new programs or higher levels of service because the Permit adopted in 2009 was prior law, not the 2000 Permit; (4) the Permit does not impose requirements unique to local agencies; and (5) claimants have authority to impose fees for the contested permit provisions.<sup>71</sup>

The Water Boards filed comments concurring with the Draft Proposed Decision.<sup>72</sup>

#### **IV. Discussion**

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service...

The purpose of article XIII B, section 6 is to “preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are ‘ill equipped’ to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.”<sup>73</sup> Thus, the subvention requirement of section 6 is “directed to state-mandated increases in the services provided by [local government] ...”<sup>74</sup>

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or “mandates” local agencies or school districts to perform an activity.<sup>75</sup>
2. The mandated activity constitutes a “program” that either:
  - a. Carries out the governmental function of providing a service to the public; or
  - b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.<sup>76</sup>
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.<sup>77</sup>

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<sup>71</sup> Exhibit D, Water Boards’ Late Comments on the Test Claim, filed October 30, 2017, pages 16-28.

<sup>72</sup> Exhibit G, Water Boards’ Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021.

<sup>73</sup> *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

<sup>74</sup> *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

<sup>75</sup> *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874.

<sup>76</sup> *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles* (1987) 43 Cal.3d 46, 56).

<sup>77</sup> *San Diego Unified School Dist.* (2004) 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal3d 830, 835.

4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.<sup>78</sup>

The Commission is vested with the exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.<sup>79</sup> The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.<sup>80</sup> In making its decisions, the Commission must strictly construe article XIII B, section 6 of the California Constitution, and not apply it as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”<sup>81</sup>

**A. The Test Claim Was Not Timely Filed and Is, Therefore, Dismissed.**

The law is clear that quasi-judicial administrative agencies, such as the Commission, have only the limited authority that is conferred upon them by law, and the courts will set aside their acts that are beyond their statutory jurisdiction.<sup>82</sup> In this respect, submitting a test claim to the Commission in accordance with Government Code sections 17500 et seq. is the exclusive method for resolving whether a cost is or is not a reimbursable state mandate.<sup>83</sup> Pursuant to Government Code section 17551(b), the Commission’s review of a test claim “may be had *only if*” the test claim is filed within the time limits specified in sections 17551(c).<sup>84</sup> Government Code section 17551(c) states that “[l]ocal agency and school district test claims shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later.” Thus, the Commission does not have the authority to hear and determine test claims filed beyond

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<sup>78</sup> *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

<sup>79</sup> *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487.

<sup>80</sup> *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

<sup>81</sup> *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1280 [citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817].

<sup>82</sup> *American Federation of Labor v. Unemployment Insurance Appeals Board* (1996) 13 Cal.4th 1017, 1023; *City and County of San Francisco v. Ang* (1979) 97 Cal.App.3d 673, 679.

<sup>83</sup> *Grossmont Union High School Dist. v. State Board of Education* (2008) 169 Cal.App.4th 869, 884 citing *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 833-834; see also, Government Code section 17552 (“This chapter shall provide the sole and exclusive procedure by which a local agency or school district may claim reimbursement for costs mandated by the state as required by Section 6 of Article XIII B of the California Constitution.”).

<sup>84</sup> Emphasis added.

the period of limitation identified in Government Code section 17551 and any late filings must be dismissed.<sup>85</sup>

In this case, the Test Claim was filed on August 26, 2011, 13 months after the Regional Board adopted the test claim permit on July 8, 2010. The permit stated that it became effective on the date of adoption provided that U.S. EPA had no objections.<sup>86</sup> The claimants assert that the effective date of the permit was delayed 50 days (until August 27, 2010) pursuant to the MOA between the State and U.S. EPA due to significant comments filed on the permit and changes made to the tentative permit prepared by Regional Board staff for the Board's July 8, 2010 hearing and adopted by the Regional Board after the written comment period expired, and so the Test Claim was timely filed.<sup>87</sup>

As explained below, the claimants' reliance on the MOA is misplaced. The Commission finds that the period of limitation for the sections pled by the claimants began to run on August 5, 2009, the effective date of Order No. 09-0057 (which *first* ordered the requirements pled by the claimants and was never stayed or set aside), or at the latest on July 8, 2010, the effective date of the test claim permit (which reconsidered Order No. 09-0057, but did not change the requirements pled by the claimants other than extending some due dates). Thus, the Test Claim filed on August 26, 2011, was not timely filed within 12 months following the effective date of the executive order as required by Government Code section 17551(c).

**1. The Provisions of the Test Claim Permit Pled by the Claimants Were Originally Adopted in Order No. 09-0057, Effective August 5, 2009 That Was Never Stayed, and Although Some of the Original Due Dates in Order 09-0057 Were Extended in the Test Claim Permit, the Requirements Remained the Same.**

As described below, all of the sections in the test claim permit that were pled by the claimants and alleged to impose a reimbursable state-mandated program were adopted in Order No. 09-0057, effective August 5, 2009. The 2009 permit was corrected in January 2010, consistent with the Regional Board's vote and adoption of Order No. 09-0057, and later remanded back to the Regional Board to consider some perceived due process issues, which resulted in the adoption of the test claim permit on July 8, 2010 (R4-2010-0108). With respect to the sections pled by the claimants, the test claim permit extended some due dates for compliance with some of those sections, giving the claimants more time to comply, but otherwise made no substantive changes to the claimed requirements imposed by Order No. 09-0057. A summary of the relevant events from the administrative records of the Water Boards follows.

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<sup>85</sup> California Code of Regulations, title 2, section 1183.1(h).

<sup>86</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 162 (test claim permit, which states in Finding G4, "This Order shall serve as a NPDES permit, pursuant to CWA § 402, and shall take effect on (Order adoption date) provided the Regional Administrator of the U.S. EPA has no objections.").

<sup>87</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 17.

- On May 7, 2009, the Regional Board adopted Order No. 09-0057, with an effective date 90 days thereafter (August 5, 2009).<sup>88</sup> Before the Regional Board’s May 7, 2009 hearing, the permittees, the Natural Resources Defense Council (NRDC), and Heal the Bay agreed on permit terms involving new development and redevelopment performance criteria, including onsite retention requirements; a five percent Effective Impervious Area (EIA) limitation, infeasibility criteria, a 30 percent EIA cap, and off-site mitigation provisions; elimination of the municipal action level (MAL) requirements in the tentative permit; and year round beach water quality monitoring at 10 sites.<sup>89</sup> The agreement was submitted to the Regional Board in a letter dated April 10, 2009.<sup>90</sup> At the May 7, 2009 hearing, these interests advocated that their agreement be incorporated into the permit verbatim in its entirety.<sup>91</sup>
- The tentative permit that the Regional Board staff prepared for the May 7, 2009 hearing, included in Part 5, Section E.III. (New Development/ Redevelopment Performance Criteria) section 1 (Integrated Water Quality/Flow Reduction/Resource Management Criterion), section 2 (Hydromodification Control Criteria), and section 3 (Water Quality Mitigation Criteria).<sup>92</sup> Staff did not recommend incorporating the terms of the agreement into the permit.<sup>93</sup>
- At the May 7, 2009 hearing, the Regional Board amended the tentative permit by striking Part 2 (MALs) as well as Section E.III.1 of Part 5, and replacing it with the terms of the agreement.<sup>94</sup> Originally, the Board member stated the motion as striking all of Section E.III, but it was later clarified that she intended to strike only Section E.III.1. That

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<sup>88</sup> Exhibit I(1)(h), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order 09-0057, page 46). Section G.4 of Order No. 09-0057 sets the effective date 90 days from the May 7, 2009 adoption date: “This Order shall serve as a NPDES permit ... and shall take effect 90 days from Order adoption date provided the U.S. EPA has no objection.”).

<sup>89</sup> Exhibit I(1)(d), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Hearing Notice for the test claim permit, page 1).

<sup>90</sup> Exhibit I(5), State Board’s Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, pages 535-567.

<sup>91</sup> Exhibit I(1)(d), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Hearing Notice for the test claim permit, page 1).

<sup>92</sup> Exhibit I(1)(n), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (2009 Revised Tentative Permit, pages 64-74); Exhibit I(1)(b), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Agenda Item for 2009 Tentative Permit, page 12).

<sup>93</sup> Exhibit I(1)(b), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Agenda Item for 2009 Tentative Permit, page 15).

<sup>94</sup> Exhibit I(1)(f), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (May 7, 2009 Hearing Transcript, pages 357-371).

motion was adopted.<sup>95</sup> With the removal of Part 2 (MALs), the agreement became Part 4.E.III.1. and 2. of the 2009 permit (Integrated Water Quality/Flow Reduction/Resources Management Criteria, and Alternative Compliance for Technical Infeasibility).<sup>96</sup>

- On June 2, 2009, the Regional Board issued Order No.09-0057.<sup>97</sup> As issued, it included the terms of the agreement in Part 4.E.III.1 and 2, but did not include Part 4, Sections E.III.3 (addressing Hydromodification), and E.III.4 (Water Quality Mitigation Criteria).<sup>98</sup> As described further below, the omission of these sections was inadvertent and the permit was corrected on January 13, 2010 and re-issued on January 28, 2010.<sup>99</sup>
- Order No. 09-0057, as issued June 2, 2009, contained the following parts (*except for the language in italics that was added when the corrected permit was re-issued on January 28, 2010*) pled by the claimants in the Test Claim:
  - Public Information and Participation Program- Part 4.C.2(c)(1)(C), 4.C.2(c)(2),(6), (8), and 4.C.2(d).; 4.C.3(a),(b).<sup>100</sup>

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<sup>95</sup> Exhibit I(1)(f), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (May 7, 2009 Hearing Transcript, pages 357-371), with clarification of the motion and second on page 359, lines 7-11.

<sup>96</sup> Exhibit I(1)(h), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, pages 72-73).

<sup>97</sup> Exhibit I(1)(h), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, page 1-2).

<sup>98</sup> Exhibit I(1)(h), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, pages 76-80).

<sup>99</sup> Exhibit I(2), Regional Board’s Corrected 2009 Permit Order No. 09-0057, January 13, 2010, [https://www.waterboards.ca.gov/losangeles/water\\_issues/programs/stormwater/municipal/ventura\\_ms4/Final\\_Ventura\\_County\\_MS4\\_Permit\\_Order\\_No.09-0057\\_01-13-2010.pdf](https://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/ventura_ms4/Final_Ventura_County_MS4_Permit_Order_No.09-0057_01-13-2010.pdf) (accessed on March 24, 2021), page 631; Exhibit I(3), Regional Board’s Letter Issuing the Corrected 2009 Permit Order No. 09-0057, January 28, 2010, [https://www.waterboards.ca.gov/rwqcb4/water\\_issues/programs/stormwater/municipal/ventura\\_ms4/Final%20Transmittal%20\\_Letter-Corrected\\_Ventura\\_County\\_MS4\\_Permit\\_Order\\_No.09-0057.pdf](https://www.waterboards.ca.gov/rwqcb4/water_issues/programs/stormwater/municipal/ventura_ms4/Final%20Transmittal%20_Letter-Corrected_Ventura_County_MS4_Permit_Order_No.09-0057.pdf) (accessed on March 24, 2021).

<sup>100</sup> Exhibit I(1)(h), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, pages 58-62); Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 27-29, 173-175 (test claim permit).

- Reporting Program and Program Effectiveness Evaluation - Part 4.I.1;<sup>101</sup> Part 3.E.1(e).<sup>102</sup>
- Special Studies - *Part 4.E.III.3(a)(1)(D-E) (Section E.III.3 was inadvertently omitted from the issued 2009 permit, but was included in the corrected permit issued in January 2010)*;<sup>103</sup> Attachment F, Section F;<sup>104</sup> Part 4.E.IV.4;<sup>105</sup> Part 4.E.III.2(c)(3)-(4).<sup>106</sup>
- Watershed Initiative Participation – Part 4.B.<sup>107</sup>
- Vehicle and Equipment Wash Areas – Part 4.G.1.3(a).<sup>108</sup>
- Illicit Connection/Illicit Discharge Elimination– Part.4.H.1.3(a).<sup>109</sup>

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<sup>101</sup> Exhibit I(1)(h), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, page 105); Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 34, 170 (test claim permit).

<sup>102</sup> Exhibit I(1)(h), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, page 56); Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 35.

<sup>103</sup> Exhibit I(2), Regional Board’s Corrected 2009 Permit Order No. 09-0057, January 13, 2010, [https://www.waterboards.ca.gov/losangeles/water\\_issues/programs/stormwater/municipal/ventura\\_ms4/Final\\_Ventura\\_County\\_MS4\\_Permit\\_Order\\_No.09-0057\\_01-13-2010.pdf](https://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/ventura_ms4/Final_Ventura_County_MS4_Permit_Order_No.09-0057_01-13-2010.pdf) (accessed on March 24, 2021), page 631; Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 38, 190 (test claim permit).

<sup>104</sup> Exhibit I(1)(h), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, pages 215-216); Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 38-39, 285-286 (test claim permit).

<sup>105</sup> Exhibit I(1)(h), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, pages 83-84); Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 39-40, 196-197 (test claim permit).

<sup>106</sup> Exhibit I(1)(h), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, pages 78-79); Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 40-41, 188 (test claim permit).

<sup>107</sup> Exhibit I(1)(h), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, pages 57-58); Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 44-45, 171-172 (test claim permit).

<sup>108</sup> Exhibit I(1)(h), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, page 97). Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 48, 209 (test claim permit).

<sup>109</sup> Exhibit I(1)(h), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, page 103); Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 50-51, 215-216 (test claim permit).

- U.S. EPA was involved in stakeholder meetings prior to Order 09-0057’s adoption<sup>110</sup> and expressed support for it after adoption.<sup>111</sup>
- On June 8, 2009, the Building Industry Association of Southern California, Building Industry Legal Defense Foundation, and Construction Industry Coalition on Water Quality (collectively, “BIA”), petitioned the State Board to review Order No. 09-0057 based on the following allegations:<sup>112</sup>
  - Violation of due process – the Regional Board adopted a side agreement that was not publicly noticed. The side agreement was a fundamental policy shift, and not a natural evolution of the drafting process. According to the points and authorities – “the Permanent Retention Requirement radically shifts the goal of LID from maintaining the preconstruction natural hydrology to arresting the preconstruction natural hydrology.”
  - The permit unlawfully regulates matters that are not subject to the NPDES program; namely, by requiring that all new development and redevelopment retain on site diffuse surface water without showing the nexus to the MS4.
  - The Regional Board disregarded the authority and laws governing local government.
  - The 2009 Permit is not supported by substantial evidence, but instead relied on a secret agreement.
  - The Regional Board did not consider the factors in Water Code 13241.

The petition also requested that the State Board suspend the permit, and that any application of the permit be stayed.<sup>113</sup>

- On June 24, 2009, the State Board denied the request for a stay of Order No. 09-0057 because it was not supported by an affidavit explaining the facts supporting the request, it did not allege facts regarding substantial harm, and the facts and declaration did not explain actions or costs during the time the State Board will review the petition.<sup>114</sup>

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<sup>110</sup> Exhibit I(1)(b), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Agenda Item for the 2009 Tentative Permit, pages 2-3).

<sup>111</sup> Exhibit I(5), State Board’s Administrative Record for the Petition on the 2009 Permit, pages 602-603 (U.S. EPA letter of March 17, 2010).

<sup>112</sup> Exhibit I(1)(d), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Hearing Notice for the test claim permit, page 1).

<sup>113</sup> Exhibit I(5), State Board’s Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, pages 5-14; See also the points and authorities, pages 16-36.

<sup>114</sup> Exhibit I(5), State Board’s Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, page 259.

- On July 7, 2009, BIA filed a supplemental request for a stay of the 2009 permit.<sup>115</sup>
- On July 29, 2009, counsel for the claimants filed an opposition to the petition, which also shows the permittees' agreement with the provisions that were added when the Regional Board adopted Order No. 09-0057.<sup>116</sup> The letter states, in relevant part:

In this case, as with any negotiation to reach consensus, the Permittees, HTB and NRDC each gave up something from previously entrenched positions. The results of these discussions culminated in the Joint Comment Letter that was submitted to the Regional Water Board as part of its public review process.

[¶] . . . [¶]

In this case, the Joint Comment Letter contained agreement on four key issues relative to the MS4 Permit: Low Impact Development, Municipal Action Levels, Beach Water Quality Monitoring, and Best Management Performance Criteria. All four of these issues, and many others, were highly debated and discussed by all interested stakeholders that participated in the Regional Water Board's two-year plus process for the development of this MS4 Permit. The Petitioners actively participated in this process, which included many public workshops and stakeholder meetings. More importantly, all four issues identified in the Joint Comment Letter were part of the proposed MS4 Permit that was issued on February 24, 2009, and the version revised on April 30, 2009. Thus, the Regional Water Board's action to adopt the MS4 Permit with amendments reflective of timely submitted comments on four key, highly debated issues, was a logical outgrowth of the proposed permit noticed by the Regional Water Board.<sup>117</sup>

- On August 3, 2009, the Regional Board filed its response to the petition for the stay.<sup>118</sup>
- On August 25, 2009, the State Board denied BIA's request to stay Order No. 09-0057, because BIA did not comply with the regulatory requirement for a stay.<sup>119</sup>
- On January 13, 2010, the Regional Board corrected Order No. 09-0057, reinserting Part 4, E.III.3. and 4. (Hydromodification, and Water Quality Mitigation Criteria), which were

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<sup>115</sup> Exhibit I(5), State Board's Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, pages 267-280.

<sup>116</sup> Exhibit I(5), State Board's Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, pages 313-315.

<sup>117</sup> Exhibit I(5), State Board's Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, page 314.

<sup>118</sup> Exhibit I(5), State Board's Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, pages 489-496.

<sup>119</sup> Exhibit I(5), State Board's Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, pages 497-502.



inadvertently omitted.<sup>120</sup> Section G.4 of the corrected permit reiterated the effective date as 90 days from the May 7, 2009 adoption as follows: “This Order shall serve as a NPDES permit ... and shall take effect 90 days from Order adoption date (August 5, 2009) provided the U.S. EPA has no objection.”<sup>121</sup>

- On January 28, 2010, the Regional Board issued the corrected 2009 permit, stating:

The Regional Board has corrected the Final Ventura County MS4 Permit, dated May 7, 2009, pursuant to 40 CFR 122.63(a), to correct omissions, section numbering/pagination, and minor typographical errors. Specifically, subpart 3. Hydromodification (Flow/ Volume/ Duration) Control Criteria, and subpart 4. Water Quality Mitigation Criteria contained in Part 4.E.III - New Development/ Redevelopment Performance Criteria, beginning on page 55 of the enclosed document, were adopted by the Board, but were inadvertently omitted when the Order was finalized after the Board meeting. Additionally, actual calendar dates have been inserted where previously there were references to the time period from permit adoption. The corrected final permit, as it was adopted on May 7, 2009, is transmitted herewith.

Board Order R4-2009-0057 shall be effective as of August 5, 2009, 90 days from May 7, 2009, as stated in the Order, and serves as the federal NPDES permit and State waste discharge requirements for storm water (wet weather) and non-storm water (dry weather) discharges from the MS4 within the Ventura County Watershed Protection District, County of Ventura, and the incorporated cities therein. The expiration date of this NPDES permit is May 7, 2014.<sup>122</sup>

- On February 24, 2010, the State Board suspended the deadline for additional comments on BIA’s petition for review until further notice because of the Regional Board’s January 28, 2010 issuance of the corrected permit containing significant changes.<sup>123</sup>

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<sup>120</sup> Exhibit I(2), Regional Board’s Corrected 2009 Permit Order No. 09-0057, January 13, 2010, [https://www.waterboards.ca.gov/losangeles/water\\_issues/programs/stormwater/municipal/ventura\\_ms4/Final\\_Ventura\\_County\\_MS4\\_Permit\\_Order\\_No.09-0057\\_01-13-2010.pdf](https://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/ventura_ms4/Final_Ventura_County_MS4_Permit_Order_No.09-0057_01-13-2010.pdf) (accessed on March 24, 2021), pages 63-67.

<sup>121</sup> Exhibit I(2), Regional Board’s Corrected 2009 Permit Order No. 09-0057, January 13, 2010, [https://www.waterboards.ca.gov/losangeles/water\\_issues/programs/stormwater/municipal/ventura\\_ms4/Final\\_Ventura\\_County\\_MS4\\_Permit\\_Order\\_No.09-0057\\_01-13-2010.pdf](https://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/ventura_ms4/Final_Ventura_County_MS4_Permit_Order_No.09-0057_01-13-2010.pdf) (accessed on March 24, 2021), page 36.

<sup>122</sup> Exhibit I(3), Regional Board’s Letter Issuing the Corrected 2009 Permit Order No. 09-0057, January 28, 2010, [https://www.waterboards.ca.gov/rwqcb4/water\\_issues/programs/stormwater/municipal/ventura\\_ms4/Final%20Transmittal%20Letter-Corrected\\_Ventura\\_County\\_MS4\\_Permit\\_Order\\_No.09-0057.pdf](https://www.waterboards.ca.gov/rwqcb4/water_issues/programs/stormwater/municipal/ventura_ms4/Final%20Transmittal%20Letter-Corrected_Ventura_County_MS4_Permit_Order_No.09-0057.pdf) (accessed on March 24, 2021).

<sup>123</sup> Exhibit I(5), State Board’s Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, pages 584-585.

- On March 10, 2010, the Chief Counsel of the State Board requested that the Regional Board agree to a voluntary remand of the 2009 permit and that BIA agree to place their petition in abeyance, in light of “apparent irregularities and confusion in this matter” and because the State Board would not have time to review the corrected permit and the arguments before the deadline for the Board to take action on the petition, which dismisses it by default.<sup>124</sup> The March 10th letter noted the following issues: (1) corrections were made to the permit nearly eight months after the adopted permit was circulated; (2) documents were omitted from the administrative record of the permit that was sent to the State Water Board; (3) the Regional Board, in response to the petition, asked the State Board to correct a finding; and (4) [BIA] Petitioners argued that the approved permit should have been recirculated before adoption due to “alleged irregularities in the hearing.”<sup>125</sup>
- On March 11, 2010, the Regional Board agreed to a remand in order to address the “perceived procedural issues.”<sup>126</sup>
- On March 15, 2010, the Ventura County permittees asked the Regional Board to stay the 2009 permit, and in particular to stay Part 4, Section E (Planning and Land Development

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<sup>124</sup> Exhibit I(5), State Board’s Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, page 593-594; Exhibit I(1)(d), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed on October 12, 2017 (Hearing Notice for the test claim permit, page 1).

<sup>125</sup> Exhibit I(5), State Board’s Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, page 593-594; Exhibit I(1)(d), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed on October 12, 2017 (Hearing Notice for the test claim permit, page 1).

<sup>126</sup> Exhibit I(5), State Board’s Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, page 597; Exhibit I(1)(d), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Hearing Notice for the test claim permit, pages 1-2), which states: “Specifically, the March 10 letter [from the State Board] noted four procedural issues: (1) corrections were made to the permit after the adopted permit was circulated; (2) a significant number of documents were inadvertently omitted from the administrative record that was transmitted to the State Water Board; (3) the Regional Board in its response to the petition asked the State Water Board to correct a finding in the permit; and (4) BIA had argued that the approved version of the permit should have been recirculated prior to adoption because of alleged irregularities at the hearing. On March 11, 2010, the Regional Board agreed to voluntary remand of Order No. 09-0057 in order to address these concerns. Accordingly, the Regional Board proposes to reconsider adoption of Order No. 09-0057 to address the perceived procedural concerns related to incorporation of the Agreement into the adopted permit. *As such, the scope of this hearing is narrow, and the Regional Board will accept only limited comments and evidence as described below in Section II (Scope of Hearing).*” Emphasis added.

requirements, including the LID provisions) and the updated planning guidance manual (E.IV.4(b)) that was due to the Regional Board on May 6, 2010.<sup>127</sup>

- By letter dated March 17, 2010, the BIA argued to the Chief Counsel of the State Board that a voluntary remand of the Order was not appropriate, but BIA would agree to withdraw its petition if the Regional Board would agree to stay the Planning and Land Development provisions in Part 4 E., and begin the permit review process again.<sup>128</sup>
- On March 17, 2010, U.S. EPA filed a letter with the State Board strongly supporting Order No. 09-0057 as adopted on May 7, 2009, including Part 4.E.III., and encouraged the Regional Board to limit remand to the corrections made to (1) the Permit after it was issued on June 2, 2009, (2) the documents that may have been omitted from the administrative record, and (3) the corrected finding requested by the Regional Board.<sup>129</sup>
- On March 18, 2010, NRDC and Heal the Bay filed a letter with the State Board opposing a voluntary remand and explaining that that Order adopted on May 7, 2009 was corrected in January 2010 because the Regional Board reinstated subpart 3, Hydromodification, and subpart 4, Water Quality Mitigation Criteria, both of which are contained in Part 4.E.III. By letter dated January 28, 2010, to the permittees, the Regional Board explained that those sections were inadvertently omitted when it adopted the Order and intended to replace only Section E.III.1, and not all of Section E.III.<sup>130</sup>
- On March 22, 2010, NRDC and Heal the Bay filed a letter with the Regional Board opposing the request for a stay on the ground that there is no legal basis to grant a stay, and because the permittees agreed to the provisions they are now requesting to be stayed.<sup>131</sup>
- On March 25, 2010, the Regional Board's Executive Officer issued a letter denying the permittees' request for a stay, stating "until the Los Angeles Water Board takes further action on the Ventura County MS4 permit (which is currently scheduled for

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<sup>127</sup> Exhibit I(1)(i), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Permittee's Letter of March 15, 2010, page 1).

<sup>128</sup> Exhibit I(5), State Board's Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, pages 599-600.

<sup>129</sup> Exhibit I(5), State Board's Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, pages 602-603 (U.S. EPA letter of March 17, 2010).

<sup>130</sup> Exhibit I(5), State Board's Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, pages 608-612.

<sup>131</sup> Exhibit I(1)(g), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (NRDC & Heal the Bay letter of March 22, 2010, pages 1-4).

July 8, 2010), the existing permit, including all of its provisions, remain in full force and effect.”<sup>132</sup>

- By letter dated March 30, 2010, the BIA petition was dismissed as a matter of law, effective March 29, 2010, because of the State Board’s failure to make a formal disposition on the petition.<sup>133</sup>
- On May 5, 2010, the Regional Board issued a notice of hearing for July 8, 2010 to reconsider “only . . . the portions of the proposed permit that were not previously subject to a notice and comment period outside of the public hearing.”<sup>134</sup> The notice states:

The Regional Board will consider whether to affirm Order No. 09-0057 that was previously adopted on May 7, 2009. Because the majority of the provisions of Order No. 09-0057 were previously subject to public comment, the Regional Board is providing an opportunity for parties and interested persons to comment and submit evidence only on the portions of the proposed permit that were not previously subject to a notice and comment period outside of the public hearing. These portions include provisions that incorporated the Agreement into the permit, as well as new or revised findings and evidence proposed by staff that supported the incorporation of the Agreement into the permit. In a few instances, additional minor modifications are also proposed by staff to be made to the permit to correct typographical errors or to provide greater clarification on non-Agreement related provisions.

[¶] . . . [¶]

Parties and interested persons are advised that, in lieu of affirming Order No. 09-0057 with staff proposed modifications, the Regional Board may adopt the draft permit originally presented to the Regional Board at the May 7, 2009 hearing. Since the entire original draft permit, including the provisions relating to Municipal Action Levels (MALs) and the planning and land development program and their associated findings, was already the subject to a full public notice and comment period, the Regional Board may choose to adopt the draft permit (or certain of its provisions). Moreover, since the entire original draft permit already received full notice and comment, the Regional Board will not accept new comments or evidence on the provisions of the original draft permit that did not change from the original staff proposal to the adopted permit, or on the provisions of the currently noticed permit that the Regional Board did not adopt (i.e., the provisions relating to MALs and the planning and land development program). The comments and evidence

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<sup>132</sup> Exhibit I(1)(j), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Regional Board letter of March 25, 2010, page 1).

<sup>133</sup> Exhibit I(5), State Board’s Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, page 613.

<sup>134</sup> Exhibit I(1)(d), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Hearing Notice for the test claim permit, page 2).

previously submitted for the May 7, 2009 hearing that were included in the Regional Board's May 7, 2009 agenda binder will be recirculated to the Regional Board members.<sup>135</sup>

- The tentative permit issued for comment on May 5, 2010 contains strikeout and underline showing the agreement and staff-proposed modifications to the corrected permit issued January 28, 2010.<sup>136</sup> Part 4, Section E.III.1 and 2 (the agreement) are reinserted and underlined.<sup>137</sup> Also, Findings 16-29 are added to support Part 4, Section E.III.1 and 2.<sup>138</sup> There are other minor non-substantive changes, and some changes to dates.
- Between May 5, 2010 and June 7, 2010, the Regional Board received 21 written comments on the remanded tentative permit.<sup>139</sup> The Regional Board responded in writing to all comments filed.<sup>140</sup>
- On June 4, 2010, U.S. EPA filed comments stating:

EPA supports the adoption of the permit as proposed in the tentative order. ... Although we were not involved in the preparation of alternative suggestions from the Permittees and these non-governmental organizations, nor did we directly receive a copy of their April 10, 2009 letter, we encountered the April 10, 2009 letter on [the Board's] website and concluded that the proposed

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<sup>135</sup> Exhibit I(1)(d), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Hearing Notice for the test claim permit, pages 2-3). As indicated above, at the May 7, 2009 hearing the Regional Board rejected Part 2, municipal action levels, as well as Section E.III.1.(New Development/ Redevelopment Performance Criteria). Exhibit I(1)(f), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (May 7, 2009 Hearing Transcript, pages 357-371), with clarification of the motion and second on page 359, lines 7-11.

<sup>136</sup> Exhibit I(1)(d), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Hearing Notice for the test claim permit, page 2). Exhibit I(3), Regional Board's Letter Issuing the Corrected 2009 Permit Order No. 09-057, January 28, 2010, [https://www.waterboards.ca.gov/rwqcb4/water\\_issues/programs/stormwater/municipal/ventura\\_ms4/Final%20Transmittal%20Letter-Corrected\\_Ventura\\_County\\_MS4\\_Permit\\_Order\\_No.09-0057.pdf](https://www.waterboards.ca.gov/rwqcb4/water_issues/programs/stormwater/municipal/ventura_ms4/Final%20Transmittal%20Letter-Corrected_Ventura_County_MS4_Permit_Order_No.09-0057.pdf) (accessed on March 24, 2021).

<sup>137</sup> Exhibit I(1)(o), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (2010 Tentative Permit, pages 65-67).

<sup>138</sup> Exhibit I(1)(o), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (2010 Tentative Permit, pages 13-19).

<sup>139</sup> Exhibit I(1)(p), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (2010 Tentative Permit Comments, pages 1-261).

<sup>140</sup> Exhibit I(1)(q), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (2010 Tentative Permit Comment Responses, pages 1-259).

LID provisions met our criteria as a clear, measurable, and enforceable approach.

[¶] . . . [¶]

In conclusion, *we are supportive of the Tentative Permit issued May 5, 2010, and recommend prompt adoption* of the Ventura MS4 permit without further diverting the LARWQCB [Regional Board] staff resources away from other stormwater permitting priorities.<sup>141</sup>

- At the July 8, 2010 hearing, the Regional Board staff stated:

The scope [of the public notice for the hearing] specifically excluded the other permit provisions proposed by staff and adopted by the board and therefore subject to full public notice and opportunity for comment before and at the May 2009, hearing.

The key elements included in the scope of the recent 2010 public notice were the new development and redevelopment performance criteria specifically those related to on-site retention requirements, the cap on impervious areas, and off-site irrigation requirements, and expanded year round beach water quality monitoring, and additional findings to support the new development and redevelopment performance criteria.

And in some instances, additional minor modifications are also proposed by staff to be made to the permit to correct typographical errors, or provide greater clarification on provisions that were not related to the consensus language. These are also shown in changes on the publicly noticed tentative permit.<sup>142</sup>

- After the written comment period and during the Regional Board’s July 8, 2010 hearing, the Regional Board made additional changes to the tentative permit, including to section 4.E.III.2.c.2 relating to Alternative Compliance Measures, in order to “eliminate the strict 30% cap on EIA [Effective Impervious Area] and increase the off-site mitigation ratio for these sites.”<sup>143</sup> This Test Claim does *not* plead section 4.E.III.2.c.2.

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<sup>141</sup> Exhibit I(1)(m), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (U.S. EPA letter of June 4, 2010, pages 1-2). Emphasis added.

<sup>142</sup> Exhibit I(1)(e), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (July 8, 2010 Hearing Transcript, page 11).

<sup>143</sup> Exhibit I(1)(c), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Change Sheet for the Tentative Ventura County MS4 Order, pages 3-4).

- At the July 8, 2010 hearing, the Regional Board adopted the test claim permit, Order No. R4-2010-0108, including the modification to section 4.E.III.2.c.2.<sup>144</sup>
- The Test Claim filed on Permit R4-2010-0108 contains the following parts (as pled by the claimants):
  - Public Information/Participation Program - Part 4.C.2(c)(1)(C), 4.C.2(c)(2),(6),(8), and 4.C.2(d).; 4.C.3(a),(b):  
 These sections are the same in Order No. 09-0057, except that the test claim permit changed the due date from “no later than May 7, 2010 (one year after 09-0057 was adopted),” to “no later than (365 days after Order adoption date).”<sup>145</sup>
  - Reporting Program and Program Effectiveness Evaluation - Part 4.I.1; Part 3.E.1(e):  
 Part 4.I.1 is the same in Order No. 09-0057, except that the test claim permit changed the due date from “no later than May 7, 2010” to “no later than one year after the adoption of this permit (July 8, 2011).”<sup>146</sup>  
 Part 3.E.1(e) is the same in Order No. 09-0057, and no changes were made.<sup>147</sup>  
Special Studies - Part 4.E.III.3(a)(1)(D-E); Attachment F, Section F; Part 4.E.IV.4; Part 4.E.III.2(c)(3-4):  
 Part 4.E.III.3(a)(1)(D-E) is the same in Order No. 09-0057, as corrected on January 13, 2010.<sup>148</sup>  
 Attachment F, Section F, is the same in Order No. 09-0057, except that a due date for a letter regarding how permittees will comply with the hydromodification

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<sup>144</sup> Exhibit I(1)(e), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (July 8, 2010 Hearing Transcript, pages 166-167).

<sup>145</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 173-175 (test claim permit); Exhibit I(1)(h), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, pages 58-62).

<sup>146</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 217 (test claim permit); Exhibit I(1)(h), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, page 105).

<sup>147</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 170 (test claim permit); Exhibit I(1)(h), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, page 56).

<sup>148</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 190 (test claim permit); Exhibit I(2), Regional Board’s Corrected 2009 Permit Order No. 09-0057, January 13, 2010, [https://www.waterboards.ca.gov/losangeles/water\\_issues/programs/stormwater/municipal/ventura\\_ms4/Final\\_Ventura\\_County\\_MS4\\_Permit\\_Order\\_No.09-0057\\_01-13-2010.pdf](https://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/ventura_ms4/Final_Ventura_County_MS4_Permit_Order_No.09-0057_01-13-2010.pdf) (accessed on March 24, 2021), page 631.

control study is changed from “no later than July 7, 2009” (09-0057) to “no later than 2 months after Order adoption date (R4-2010-0108).”<sup>149</sup>

Part 4.E.IV.4 is the same in Order No. 09-0057 (requiring permittees to update the technical guidance manual on stormwater quality control measures), except that the due date to update the guidance manual is changed from “within 365 days of this order” to “shall update ... within (120 days of Order adoption date).”<sup>150</sup>

Part 4.E.III.2(c)(3)-(4) is the same in Order No. 09-0057.<sup>151</sup>

- Watershed Initiative Participation – Part 4.B:

Part 4.B is the same in Order No. 09-0057.<sup>152</sup>

- Vehicle and Equipment Wash Areas – Part 4.G.1.3(a):

Part 4.G.1.3(a) is the same in Order No. 09-0057, except that the due date is changed from “May 7, 2010,” to “no later (365 days from Order adoption date).”<sup>153</sup>

- Illicit Connection/Illicit Discharge Elimination – Part 4.H.1.3(a):

Part 4.H.1.3(a) is the same in Order No. 09-0057, except that one of the due dates in A.(i) changed from “no later than May 7, 2010” to “no later than 90 days from adoption Order date (October 6, 2010).”<sup>154</sup>

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<sup>149</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 285-286 (test claim permit); Exhibit I(1)(h), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, pages 215-216).

<sup>150</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 196-197 (test claim permit); Exhibit I(1)(h), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, pages 83-84).

<sup>151</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 188 (test claim permit); Exhibit I(1)(h), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, pages 78-79).

<sup>152</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 171-172 (test claim permit); Exhibit I(1)(h), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, pages 57-58).

<sup>153</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 209 (test claim permit); Exhibit I(1)(h), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, page 97).

<sup>154</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 215-216 (test claim permit); Exhibit I(1)(h), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, page 103).



- The test claim permit states in Finding G4, “This Order shall serve as a NPDES permit, pursuant to CWA § 402, and shall take effect on (Order adoption date) provided the Regional Administrator of the U.S. EPA has no objections.”<sup>155</sup>

The claimants argue that the focus should be on the 2010 Permit and not on Order 09-0057:

That the final 2010 version of the permit imposes requirements originally found in the 2009 version of the permit is irrelevant for purposes of section 17551(c) because the 2009 version was in reality determined by the Water Boards to not be properly adopted and was rescinded in its entirety by the Regional Board upon reconsideration.<sup>156</sup>

The claimants’ assertion that the 2009 Permit “was rescinded in its entirety by the Regional Board” is without merit. Rather, the unaltered requirements in Order 09-0057 remained in effect from their August 5, 2009 effective date to the test claim permit’s adoption, as those unaltered provisions carried forward to the test claim permit. As the Regional Board declared in the test claim permit:

Prior to the issuance of this permit, storm water discharges from the Ventura County MS4 were covered under the countywide waste discharge requirements contained in Order 09-0057, adopted by the Regional Water Board on May 7, 2009, . . . . Order 09-0057 also served as a National Pollutant Discharge Elimination System (NPDES) permit for the discharge of municipal storm water.<sup>157</sup>

As explained above, all of the sections in the test claim permit that were pled by the claimants and alleged to impose a reimbursable state-mandated program were originally adopted in Order No. 09-0057, effective August 5, 2009. The 2009 permit was corrected in January 2010, consistent with the Regional Board’s vote and adoption of Order No. 09-0057, and later remanded back to the Regional Board to consider some alleged procedural issues that resulted in the adoption of the test claim permit on July 8, 2010 (R4-2010-0108). The test claim permit extended some due dates for compliance with some of the sections pled, giving the claimants more time to comply, but otherwise made no substantive change to the provisions in Order No. 09-0057 that included the same requirements.

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<sup>155</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 162 (test claim permit).

<sup>156</sup> Exhibit H, Claimants’ Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 4.

<sup>157</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 131 (test claim permit).

**2. The Period of Limitation for the Permit Sections Pled by the Claimants Began to Run on August 5, 2009, the Effective Date of Order No. 09-0057, or at the Latest July 8, 2010, the Effective Date that the Regional Board Noticed in the Test Claim Permit, so the Test Claim Filed August 26, 2011, Was Not Timely Filed Within 12-Months Following the Effective Date of the Executive Order as Required by Government Code Section 17551(c). The Claimants’ Reliance on the MOA Is Misplaced.**

The courts treat deadlines to file claims before administrative agencies the same as statutes of limitation.<sup>158</sup> The California Supreme Court explained that a statute of limitation accrues, or begins to run, when the cause of action is complete with all of its elements:

Statutes of limitation do not begin to run until a cause of action accrues. (*Romano v. Rockwell International, Inc.* (1996) 14 Cal.4th 479, 487 [59 Cal.Rptr.2d 20, 926 P.2d 1114].) [¶] Generally speaking, a cause of action accrues at “the time when the cause of action is complete with all of its elements.” [Citations.]<sup>159</sup>

For the purposes of filing a test claim, the period of limitation in Government Code section 17551(c) begins to run following the effective date of the statute or executive order pled, and the claimant has 12 months from that date to file a test claim.<sup>160</sup> That deadline can be extended if the claimant can show that costs were first incurred after the effective date of the statute or executive order pled in the claim, but the claimants do not assert an extension on that basis.

Rather, the claimants request that the Commission ignore the effective date of the test claim permit noticed by the Regional Board (July 8, 2010), to find that the Test Claim was timely filed because the permit’s effective date was delayed 50 days pursuant to the MOA between the State and U.S. EPA. The claimants argue that the MOA delay provision applies due to the “significant” number of comments received by the Regional Board, and because the permit adopted on July 8, 2010 was revised from the tentative permit issued on May 5, 2010, and the revision was not to accommodate U.S. EPA comments.<sup>161</sup> The claimants also argue that the MOA is an extension of U.S. EPA’s authority under the Clean Water Act and so the provisions of the permit cannot “modify or supersede the provisions in the MOA.”<sup>162</sup>

As explained below, the claimants’ reliance on the MOA is misplaced. The Commission finds that the period of limitation for the sections of the test claim permit pled by the claimants began

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<sup>158</sup> *Bi-Rite Meat & Provisions Co. v. City of Hawaiian Gardens Redevelopment Agency* (2007) 156 Cal.App.4th 1419, 1429-1434; *International Union of Operating Engineers, Local No. 12 v. Fair Employment Practices Commission* (1969) 276 Cal.App.2d 504, 510.

<sup>159</sup> *Rubenstein v. Doe No. 1* (2017) 3 Cal.5th 903, 911.

<sup>160</sup> Government Code section 17551(c); see also, *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 179. [“The Legislature consistently limited reimbursement of costs by reference to the effective dates of statutes and executive orders and nothing indicates the state intended recovery of costs to be open-ended.”]

<sup>161</sup> Exhibit A, Test Claim filed August 26, 2011 and revised May 17, 2017, page 17. Exhibit E, Claimants’ Rebuttal Comments, filed January 2, 2018, pages 3-4.

<sup>162</sup> Exhibit E, Claimants’ Rebuttal Comments, filed January 2, 2018, page 2.

to run on August 5, 2009, the effective date of Order No. 09-0057, or at the latest on July 8, 2010, the effective date of the test claim permit. Thus, the Test Claim filed on August 26, 2011, was not timely filed within 12 months following the effective date of the executive order as required by Government Code section 17551(c).

- a. The period of limitation for the permit sections pled by the claimants began to run on August 5, 2009, the effective date noticed by the Regional Board in Order No. 09-0057, or at the latest July 8, 2010, the effective date noticed in the test claim permit.

Government decisions that are “adjudicative” in nature are subject to procedural due process principles, including requirements for notice of administrative decisions.<sup>163</sup> The NPDES permitting process is quasi-judicial:<sup>164</sup>

Permit issuance is a quasi-judicial, not a quasi-legislative, rule-making proceeding: “The exercise of discretion to grant or deny a license, permit or other type of application is a quasi-judicial function.” [Citations omitted.]

Instead, the Regional Board correctly followed the administrative adjudication procedures (Gov. Code, § 11445.10 et seq.) and the companion regulations at California Code of Regulations, Title 23, sections 647–648.8 or informal adjudicative public hearings.<sup>165</sup>

Notice is expressly required by Water Code section 13263(f), which states:

The regional board shall notify in writing the person making or proposing the discharge or the change therein of the discharge requirements to be met. After receipt of the notice, the person so notified shall provide adequate means to meet the requirements.

Thus, the Regional Board is required to provide notice of the permit requirements and when those requirements become effective.

As stated above, Order No. 09-0057 included all the provisions pled in the Test Claim and continued to be effective until the adoption of the test claim permit. Both the State and Regional Boards rejected requests to stay Order No. 09-0057.<sup>166</sup> As noted in the March 25, 2010 letter from the Regional Board’s Executive Officer denying the permittees’ request for a stay of Order 09-0057: “until the Los Angeles Water Board takes further action on the Ventura County MS4 permit (which is currently scheduled for July 8, 2010), the existing permit, including all of its

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<sup>163</sup> *Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612-613.

<sup>164</sup> *Marathon Oil Co. v. EPA* (1977) 564 F.2d 1253, 1260-1263.

<sup>165</sup> *City of Rancho Cucamonga v. Regional Water Quality Control Board* (2006) 135 Cal.App.4th 1377, 1385.

<sup>166</sup> Exhibit I(5), State Board’s Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, pages 497-502 (State Board Letter of August 25, 2009). Exhibit I(1)(j), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Regional Board letter of March 25, 2010, page 1).

provisions, *remains in full force and effect.*”<sup>167</sup> And the test claim permit itself states that Order No. 09-0057 governed discharges before the test claim permit was adopted.<sup>168</sup>

As an order issued by a state agency, Order No. 09-0057 is an executive order within the meaning of Government Code section 17516 and article XIII B, section 6 of the California Constitution.<sup>169</sup> In order to seek reimbursement for the provisions required by Order No. 09-0057, the claimants had to file the test claim within 12 months of its effective date, which as stated in that permit was 90 days after the May 7, 2009 adoption date, or August 5, 2009.<sup>170</sup>

Even the permit provision on Special Studies (Part 4.E.III.3(a)(1)(D-E)), which was inadvertently left out of Order No. 09-0057 as originally issued, was effective no later than the corrected 2009 permit that was issued on January 28, 2010.<sup>171</sup>

In comments on the Draft Proposed Decision, the claimants allege that Order No. 09-0057 is irrelevant to the period of limitation because it was “revoked” and “invalid” until it was re-adopted on July 8, 2010 as the 2010 Permit, arguing:

The Regional Board accepted the State Board's request to remand the matter [2009 Permit], thereby negating the need for the State Board to order a stay of the 2009 Permit. The issue for reconsideration was whether to affirm the initial adoption of the 2009 Permit, strongly suggesting the 2009 Permit and its provisions were invalid until they were properly re-adopted on July 8, 2010, after the Regional Board adhered to notice and comment requirements. This is evidenced by the Regional Board's Notice of Public Hearing dated May 5, 2010, which indicates the 2009 Permit was treated as an "original draft permit" being considered for adoption on July 8, 2010.<sup>172</sup>

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<sup>167</sup> Exhibit I(1)(j), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Regional Board letter of March 25, 2010, page 1). Emphasis added.

<sup>168</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 131 (test claim permit).

<sup>169</sup> *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 919-920 (finding that Government Code section 17516 was unconstitutional to the extent it purports to exempt orders issued by Regional Water Boards from the definition of “executive orders.”).

<sup>170</sup> Exhibit I(1)(h), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order 09-0057, page 46).

<sup>171</sup> Exhibit I(3), Regional Board’s Letter Issuing the Corrected 2009 Permit Order No. 09-057, January 28, 2010,

[https://www.waterboards.ca.gov/rwqcb4/water\\_issues/programs/stormwater/municipal/ventura\\_ms4/Final%20Transmittal%20Letter-Corrected\\_Ventura\\_County\\_MS4\\_Permit\\_Order\\_No.09-0057.pdf](https://www.waterboards.ca.gov/rwqcb4/water_issues/programs/stormwater/municipal/ventura_ms4/Final%20Transmittal%20Letter-Corrected_Ventura_County_MS4_Permit_Order_No.09-0057.pdf) (accessed on March 24, 2021).

<sup>172</sup> Exhibit H, Claimants’ Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 2.

The Commission disagrees. There is nothing in the record to suggest that Order No. 09-0057 was revoked or was invalid before being superseded by the 2010 Permit. The State Board twice, on June 24, 2009,<sup>173</sup> and on August 25, 2009,<sup>174</sup> denied a request for a stay of Order No. 09-0057, long before the Regional Board agreed to a remand on March 11, 2010.<sup>175</sup> The claimants also ignore the Regional Board's March 25, 2010 letter denying the permittees' request for a stay and stating: "until the Los Angeles Water Board takes further action on the Ventura County MS4 permit (which is currently scheduled for July 8, 2010), the existing permit, including all of its provisions, remain in full force and effect."<sup>176</sup> The claimants also overlook the following finding in the 2010 Permit that states that Order No. 09-0057 governed discharges before the 2010 Permit's adoption:

Prior to the issuance of this permit, storm water discharges from the Ventura County MS4 were covered under the countywide waste discharge requirements contained in Order 09-0057, adopted by the Regional Water Board on May 7, 2009, . . . . Order 09-0057 also served as a National Pollutant Discharge Elimination System (NPDES) permit for the discharge of municipal storm water.<sup>177</sup>

To support their allegation that Order No. 09-0057 is invalid until adoption of the new permit on July 8, 2010, the claimants cite the Regional Board's May 5, 2010 notice that references the

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<sup>173</sup> Exhibit I(5), State Board's Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, page 259.

<sup>174</sup> Exhibit I(5), State Board's Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, pages 497-502.

<sup>175</sup> Exhibit I(5), State Board's Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, page 597; Exhibit I(1)(d), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Hearing Notice for the test claim permit, pages 1-2), which states: "Specifically, the March 10 letter [from the State Board] noted four procedural issues: (1) corrections were made to the permit after the adopted permit was circulated; (2) a significant number of documents were inadvertently omitted from the administrative record that was transmitted to the State Water Board; (3) the Regional Board in its response to the petition asked the State Water Board to correct a finding in the permit; and (4) BIA had argued that the approved version of the permit should have been recirculated prior to adoption because of alleged irregularities at the hearing. On March 11, 2010, the Regional Board agreed to voluntary remand of Order No. 09-0057 in order to address these concerns. Accordingly, the Regional Board proposes to reconsider adoption of Order No. 09-0057 to address the perceived procedural concerns related to incorporation of the Agreement into the adopted permit. *As such, the scope of this hearing is narrow, and the Regional Board will accept only limited comments and evidence as described below in Section II (Scope of Hearing).*" Emphasis added.

<sup>176</sup> Exhibit I(1)(j), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Regional Board letter of March 25, 2010, page 1).

<sup>177</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 131 (test claim permit).

original draft permit.<sup>178</sup> But the claimants mischaracterize the “original draft” as the adopted Order No. 09-0057. As indicated in the following quotation from the Regional Board’s May 5, 2010 notice, the original draft permit was the permit presented to the Regional Board at the May 7, 2009 hearing, and the notice refers to un-adopted provisions of that permit such as Municipal Action Levels and the planning and land development program:

Parties and interested persons are advised that, in lieu of affirming Order No. 09-0057 with staff proposed modifications, the Regional Board may adopt the draft permit originally presented to the Regional Board at the May 7, 2009 hearing. Since the entire original draft permit, including the provisions relating to Municipal Action Levels (MALs) and the planning and land development program and their associated findings, was already the subject to a full public notice and comment period, the Regional Board may choose to adopt the draft permit (or certain of its provisions). Moreover, since the entire original draft permit already received full notice and comment, the Regional Board will not accept new comments or evidence on the provisions of the original draft permit that did not change from the original staff proposal to the adopted permit, or on the provisions of the currently noticed permit that the Regional Board did not adopt (i.e., the provisions relating to MALs and the planning and land development program). The comments and evidence previously submitted for the May 7, 2009 hearing that were included in the Regional Board’s May 7, 2009 agenda binder will be recirculated to the Regional Board members.<sup>179</sup>

The claimants also argue that filing a test claim on Order No. 09-0057, while the permit was actively being reconsidered by the Regional Board, would have been premature because the specific mandates in the permit reasonably could have changed upon reconsideration.<sup>180</sup> This ignores the limited nature of the reconsideration and assumes that the reconsideration would change the permit when that may not have been the case. The May 5, 2010 Regional Board notice for July 8, 2010 hearing was to reconsider “only . . . the portions of the proposed [2009] permit that were not previously subject to a notice and comment period outside of the public

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<sup>178</sup> Exhibit H, Claimants’ Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 2.

<sup>179</sup> Exhibit I(1)(d), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Hearing Notice for the test claim permit, pages 2-3). As indicated above, at the May 7, 2009 hearing the Regional Board rejected Part 2, municipal action levels, as well as Section E.III.1.(New Development/ Redevelopment Performance Criteria). Exhibit I(1)(f), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (May 7, 2009 Hearing Transcript, pages 357-371), with clarification of the motion and second on page 359, lines 7-11.

<sup>180</sup> Exhibit E, Claimants’ Rebuttal Comments, filed January 2, 2018, pages 3-4. See also Exhibit H, Claimants’ Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 4.

hearing.”<sup>181</sup> Those were the provisions of the agreement that became Part 4.E.III.1. and 2. of Order No. 09-0057,<sup>182</sup> but those were *not* pled in the Test Claim.

The test claim permit did extend the due dates for some of the provisions in Order No. 09-0057, such as the Public Information/Participation Program, Part 4.C.2(c)(1)(C), 4.C.2(c)(2),(6),(8), and 4.C.2(d).; 4.C.3(a),(b); Reporting Program and Program Effectiveness Evaluation, Part 4.I.1; Special Studies, Attachment F, Section F, and Part 4.E.IV.4; Vehicle and Equipment Wash Areas, Part 4.G.1.3(a); and Illicit Connection/Illicit Discharge Elimination, Part 4.H.1.3(a). Otherwise the requirements first imposed by Order No. 09-0057 remained the same in the test claim permit. Thus, even if the later-adopted test claim permit made the “cause of action . . . complete with all of its elements,” then the period of limitation would have accrued and began to run on July 8, 2010, the date noticed by the Regional Board as the effective date of the test claim permit. As it states in Finding G4, “This Order shall serve as a NPDES permit, pursuant to CWA § 402, and shall take effect on (Order adoption date) provided the Regional Administrator of the U.S. EPA has no objections.”<sup>183</sup> The record indicates that U.S. EPA expressed support for Order No. 09-0057 and the test claim permit both in writing<sup>184</sup> and in testimony at the July 8, 2010 hearing.<sup>185</sup> Furthermore, the Regional Board’s website currently states that the test claim permit became effective on July 8, 2010 (“Effective Date: 2010-07-08”).<sup>186</sup>

None of the claimants’ public documents indicate that the test claim permit became effective later than July 8, 2010. According to the Ventura County Stormwater Quality Management Program website: “The current Ventura Countywide Stormwater Permit Order No. R4-2010-0108 was adopted in 2010 for a five-year term. The Permit expired on July 8, 2015 [five years from the effective date of July 8, 2010], but is on administrative extension until a new Permit is adopted.”<sup>187</sup> The cover letter for their 2009-2010 annual report indicates that the 2010 Permit

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<sup>181</sup> Exhibit I(1)(d), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Hearing Notice for the test claim permit, page 2).

<sup>182</sup> Exhibit I(1)(h), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, pages 72-73).

<sup>183</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 162 (test claim permit).

<sup>184</sup> Exhibit I(5), State Board’s Administrative Record for the Petition on the 2009 Permit, pages 602-603 (U.S. EPA letter of March 17, 2010); Exhibit I(1)(m), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits (U.S. EPA letter of June 4, 2010, pages 1-2).

<sup>185</sup> Exhibit I(1)(e), Excerpt of the Regional Board’s Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (July 8, 2010 Hearing Transcript, pages 110-113, 155-156).

<sup>186</sup> Exhibit I(4), Regional Board, Region 4, Adopted Orders, [https://www.waterboards.ca.gov/losangeles/board\\_decisions/adopted\\_orders/query.php?id=5894](https://www.waterboards.ca.gov/losangeles/board_decisions/adopted_orders/query.php?id=5894) (accessed April 5, 2021).

<sup>187</sup> Exhibit I(6), Ventura County Stormwater Quality Management Program, Our MS4 Permit, <https://vcstormwater.org> (accessed March 26, 2021).

was adopted on July 8, 2010, and mentions no delayed effective date.<sup>188</sup> In addition, a staff recommendation dated October 7, 2014, to the Ventura County Watershed Protection District to approve a consultant services contract for storm drain mapping to comply with the requirements of Order No. R4-2010-0108, indicates that the test claim permit was adopted on July 8, 2010, and mentions no delayed effective date.<sup>189</sup>

Thus, there is no evidence in the record or in documents publicly available of any notices issued by the Regional Board indicating that the permit had a delayed effective date as asserted by the claimants. All documents issued by the Regional Board provide notice that the effective date of the permit was July 8, 2010.

In sum, the period of limitation for the sections pled by the claimants began to run on August 5, 2009, the effective date of Order No. 09-0057, or at the latest July 8, 2010, the effective date of the test claim permit. Thus, the Test Claim filed on August 26, 2011, was not timely filed within 12 months following the effective date of the executive order as required by Government Code section 17551(c).

*b. The claimants' reliance on the MOA is misplaced. The 50-day delay of implementation in the MOA between the State Board and U.S. EPA does not apply to the test claim permit.*

The claimants argue that the Test Claim was timely filed because the effective date of the test claim permit was delayed 50 days pursuant to the MOA between the State and U.S. EPA due to the “significant” number of comments received by the Regional Board, and because the permit adopted on July 8, 2010 was revised from the draft permit issued on May 5, 2010, and the revision was not to accommodate U.S. EPA comments.<sup>190</sup> The claimants also argue that the MOA is an extension of U.S. EPA’s authority under the Clean Water Act, so the permit provisions cannot “modify or supersede the provisions in the MOA.”<sup>191</sup> Reiterating these arguments in comments on the Draft Proposed Decision, the claimants contend that the Regional Board’s failure to identify the Permit’s proper effective date in accordance with the MOA “cannot operate to override the requirements of the Clean Water Act.”<sup>192</sup>

The claimants’ reliance on the MOA is misplaced. The terms of the MOA between the State and U.S. EPA have to be understood in light of the Clean Water Act and the roles that the state and federal government play in the NPDES permitting process. Under the federal Clean Water Act,

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<sup>188</sup> Exhibit I(7), Ventura County Stormwater Quality Management Program, Transmittal letter for the 2009-2010 Annual Report, December 15, 2010, [https://vcstormwater.org/images/stories/NPDES\\_Documents/2009-10\\_Report/TransmittalLetter\\_2010\\_VenturaCountywideAnnualReport.pdf](https://vcstormwater.org/images/stories/NPDES_Documents/2009-10_Report/TransmittalLetter_2010_VenturaCountywideAnnualReport.pdf) (accessed March 26, 2021).

<sup>189</sup> Exhibit I(8), Ventura County Watershed Protection District Staff Recommendation.

<sup>190</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 17; Exhibit E, Claimants’ Rebuttal Comments, filed January 2, 2018, pages 3-4.

<sup>191</sup> Exhibit E, Claimants’ Rebuttal Comments, filed January 2, 2018, page 2.

<sup>192</sup> Exhibit H, Claimants’ Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 6.



U.S. EPA is authorized to issue NPDES permits for any pollutant discharges that will satisfy the requirements of the Clean Water Act or the U.S. EPA Administrator.<sup>193</sup> States may administer their own permitting system if authorized by U.S. EPA.<sup>194</sup> If U.S. EPA concludes that a state has adequate authority to administer a NPDES program, it must grant approval and suspend its own issuance of permits.<sup>195</sup> However, U.S. EPA retains some supervisory authority over the States' programs. States must inform U.S. EPA of all permit applications received and of any action related to the consideration of a submitted application, and U.S. EPA can withdraw approval of a State's program if a State fails to comply with the Clean Water Act.<sup>196</sup>

In order to obtain the authority to administer the NPDES program, the State is required to enter into an MOA with U.S. EPA (in this case, the regional administrator of U.S. EPA Region IX).<sup>197</sup> The MOA is signed by each agency, committing them to specific responsibilities relevant to the administration and enforcement of the State's regulatory program and U.S. EPA's program oversight. According to the Federal Regulation:

Any State that seeks to administer a program under this part shall submit a Memorandum of Agreement. The Memorandum of Agreement shall be executed by the State Director and the Regional Administrator and shall become effective when approved by the Administrator. In addition to meeting the requirements of paragraph (b) of this section [regarding the transfer of pending permit applications from U.S. EPA to the State], the Memorandum of Agreement may include other terms, conditions, or agreements consistent with this part and relevant to the administration and enforcement of the State's regulatory program. The Administrator shall not approve any Memorandum of Agreement which contains provisions which restrict EPA's statutory oversight responsibility.<sup>198</sup>

The MOA that governs adoption of NPDES permits in California became effective in September 1989.<sup>199</sup> Its purpose is to “redefine the working relationship between the State and EPA pursuant to the Federal regulatory amendments that have been promulgated since 1973. . . . The basic requirements of this MOA shall override any other State/EPA agreements as required by 40 CFR 123.24(c).”<sup>200</sup> The MOA includes the following provisions:

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<sup>193</sup> 33 United States Code section 1342(a)(1), (a)(2).

<sup>194</sup> 33 United States Code section 1342(b).

<sup>195</sup> 33 United States Code section 1342(b), (c).

<sup>196</sup> 33 United States Code section 1342(c)(3), (d); *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 756 and fn. 4.

<sup>197</sup> 40 Code of Federal Regulations section 123.24.

<sup>198</sup> 40 Code of Federal Regulations section 123.24(a).

<sup>199</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 72-120 (Memorandum of Agreement).

<sup>200</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 72-73 (Memorandum of Agreement).

1. Authorizes U.S. EPA to comment upon or object to the issuance of a permit or the terms or conditions therein. Neither the State Board nor the Regional Boards shall adopt or issue a NPDES permit until all objections made by EPA have been resolved pursuant to 40 CFR 123.44 and this MOA, and that permit review will be coordinated “through frequent telephone contact designed to not cause significant delays.” The MOA states the following:

The State Board and Regional Boards have primary authority for the issuance of NPDES permits. EPA may comment upon or object to the issuance of a permit or the terms or conditions therein. Neither the State Board nor the Regional Boards shall adopt or issue a NPDES permit until all objections made by EPA have been resolved pursuant to 40 CFR 123.44 and this MOA. The following procedures describe EPA permit review, comment, and objection options that may delay the permit process. These options present the longest periods allowed by 40 CFR 123.44. However, the process should normally require far less time.

The State Board, Regional Boards, and EPA agree to coordinate permit review through frequent telephone contact. Most differences over permit content should be resolved through telephone liaison. Therefore, permit review by the State and EPA should not delay issuing NPDES permits. However, if this review process causes significant delays, the Chief, Division of Water Quality (DWQ) of the State Board (or his or her designee), and the Director, Water Management Division (WMD) of EPA (or his or her designee) agree to review the circumstances of the delays. The State Board and EPA shall determine the reasons for the delays and take corrective action.<sup>201</sup>

2. Provides that Final permits (except general permits) become effective upon adoption when:
  - EPA has made no objections to the permit;
  - There has been no significant public comment;
  - There have been no changes made to the latest version of the draft permit that was sent to EPA for review (unless the only changes were made to accommodate EPA comments); and
  - The State Board or Regional Board does not specify a different effective date at the time of adoption.<sup>202</sup>
3. Provides that Final permits (except general permits) become effective 50 after days after adoption when:

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<sup>201</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 78 (Memorandum of Agreement, paragraph II.A.).

<sup>202</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 93 (Memorandum of Agreement, paragraph F.1.).

- There has been significant public comment; or
- Changes have been made to the latest version of the draft permit that was sent to EPA for review (unless the only changes were made to accommodate EPA comments).<sup>203</sup>

The claimants rely on the last provision, arguing that the 21 comments received before the test claim permit was adopted were significant, and that changes were made to the latest version of the draft permit that were not to accommodate U.S. EPA requests. The claimants assert that either of these reasons required a delay in the effective date of the permit.<sup>204</sup> The claimants also state that the delay provisions in the MOA are intended to provide U.S. EPA time to review permit changes.<sup>205</sup>

The record in this case shows that U.S. EPA was notified of all 21 comments and made no objection to the tentative permit.<sup>206</sup> In fact, it fully supported the terms of the tentative permit, as stated in its June 4, 2010 comments.<sup>207</sup> At the July 8, 2010 hearing, a representative from U.S. EPA expressed support for the terms of the tentative permit.<sup>208</sup> And although the tentative

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<sup>203</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 93 (Memorandum of Agreement, paragraph F.2.).

<sup>204</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 17; Exhibit E, Claimants' Rebuttal Comments, filed January 2, 2018, pages 3-4.

<sup>205</sup> Exhibit E, Claimants' Rebuttal Comments, filed January 2, 2018, page 3.

<sup>206</sup> On June 28, 2010, the parties and interested persons to the permit, including U.S. EPA, were provided notice of the availability to a link to open all comments and responses to comments for the 2010 permit. (Exhibit I(1)(q), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (2010 Tentative Permit Comment Responses, page 257), with U.S. EPA listed on the service list on page 259, service to sofranko.anna@epa.gov.) The notice and agenda for the July 8, 2010 was served, and U.S. EPA received service. (Exhibit I(1)(l), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Regional Board, Notice of Public Meeting/Hearing, July 8, 2010, page 1), with U.S. EPA listed on the service list on page 10, service to fleming.terrence@epa.gov and hashimoto.janet@epa.gov, page 15 service to stuber.robbyn@epa.gov.)

<sup>207</sup> Exhibit I(1)(m), Excerpt of the Regional Boards' Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (U.S. EPA letter of June 4, 2010, pages 1-2).

<sup>208</sup> Exhibit I(1)(e), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (July 8, 2010 Hearing Transcript, pages 110-113). John Kemmerer of U.S. EPA testified in support of the Permit, stating in relevant part:

As you know, we've all seen that this category of discharges represents the primary cause of water quality (inaudible) in coastal waters in California. Last May, I expressed E.P.A. support for the low impact development provisions that were ultimately adopted by this permit. Those adopted provisions included what we saw as unambiguous performance

permit was modified during the hearing as described in the change sheet, U.S. EPA did not object to the modifications.<sup>209,210</sup>

The claimants state that the purpose of the 50-day delay in the MOA is to “provide U.S. EPA with adequate time to review a permit that has garnered significant public attention and/or has changed during the approval process.”<sup>211</sup> Since U.S. EPA at all times expressed agreement with both Order 09-0057,<sup>212</sup> and the test claim Permit,<sup>213</sup> the purpose of EPA scrutiny was not furthered by the 50-day delay provision in the MOA.

More importantly, the MOA governs “the working relationship between the State and EPA.”<sup>214</sup> It is a contract between those parties.<sup>215</sup> The claimants disagree, arguing that this characterization of the MOA “severely oversimplifies the nature of the MOA and its legal effect

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criteria providing the valuable framework for controlling stormwater discharges for new development and redevelopment.

And one of the issues that we've had over the years here in looking at stormwater permits across our region is trying to ensure that we have clear, measurable and enforceable performance requirements in the permits. I think what you adopted last May and what's in front of you tonight provide those sort of clear requirements. Today we're supportive of the permit your staff had proposed for adoption, and we agree with the presentation your staff made of the benefits of on-site retention. We recommend you adopt the permit as proposed and look forward to working with your staff on other storm work like the L.A., the county permit and the Long Beach permit. (Exhibit I(1)(e), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (July 8, 2010 Hearing Transcript, pages 110-111).

<sup>209</sup> Exhibit I(1)(c), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Change Sheet for the Tentative Ventura County MS4 Order, pages 3-4).

<sup>210</sup> Exhibit I(1)(e), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (July 8, 2010 Hearing Transcript, pages 155-156).

<sup>211</sup> Exhibit E, Claimants' Rebuttal Comments, filed January 2, 2018, page 3.

<sup>212</sup> Exhibit I(5), State Board's Administrative Record for the Petition on the 2009 Permit, pages 602-603 (U.S. EPA letter of March 17, 2010). See also Exhibit I(1)(b), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Agenda Item for the 2009 Tentative Permit, pages 2-3), where U.S. EPA is described as a stakeholder involved in Order 09-0057.

<sup>213</sup> Exhibit I(1)(e), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits (July 8, 2010 Hearing Transcript, pages 110-113, 155-156).

<sup>214</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 72-73 (Memorandum of Agreement).

<sup>215</sup> *Tyler v. Cuomo* (9th Cir. 2000) 236 F.3d 1124, 1134, analyzing an MOA between U.S. Department of Housing and Urban Development and the City of San Francisco, finding that the MOA is a contract and the City is bound by its terms.

on the issue presented.”<sup>216</sup> The claimants describe the MOA as “a delegation of EPA’s statutory power governing the issuance of NPDES permits as required by the Clean Water Act” that “controls the distribution of NPDES program responsibilities between the EPA, State Board, and Regional Boards, including EPA’s review and comment on draft and adopted permits.”<sup>217</sup> According to the claimants, the Regional Board’s failure to identify the Permit’s proper effective date in accordance with the MOA “cannot operate to override the requirements of the Clean Water Act [CWA].”<sup>218</sup>

The CWA, however, does not govern the effective date of the test claim permit. The MOA does *not* provide notice to the permittees of the effective date of an NPDES permit, which is required by the Regional Board when it adopts a quasi-judicial order.<sup>219</sup> As discussed above, all notices issued by the Regional Board indicate that the test claim permit became effective on July 8, 2010.<sup>220</sup> There is no evidence in the record or in documents publicly available of a delayed effective date.

Accordingly, the claimants’ reliance on the MOA is misplaced.

## **V. Conclusion**

Based on the foregoing analysis, the Commission dismisses this Test Claim because it was not timely filed within 12 months of the effective date of the executive order pled pursuant to Government Code section 17551(c).

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<sup>216</sup> Exhibit H, Claimants’ Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 5.

<sup>217</sup> Exhibit H, Claimants’ Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 5.

<sup>218</sup> Exhibit H, Claimants’ Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 6.

<sup>219</sup> Water Code section 13263(f); *Marathon Oil Co. v. EPA* (1977) 564 F.2d 1253, 1260-1263; *City of Rancho Cucamonga v. Regional Water Quality Control Board* (2006) 135 Cal.App.4th 1377, 1385.

<sup>220</sup> Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 162 (test claim permit). Exhibit I(4), Regional Board, Region 4, Adopted Orders, [https://www.waterboards.ca.gov/losangeles/board\\_decisions/adopted\\_orders/query.php?id=5894](https://www.waterboards.ca.gov/losangeles/board_decisions/adopted_orders/query.php?id=5894) (accessed April 5, 2021).

## DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On September 29, 2021, I served the:

- **Decision adopted September 24, 2021**

*California Regional Water Quality Control Board, Los Angeles Region,  
Order No. R4-2010-0108, 11-TC-01*

California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2010-0108, NPDES Permit No. CAS00-4002, Adopted July 8, 2010; Public Information and Participation Program: Parts 4.C.2(c)(1)(C), 4.C.2(c)(2),(6),(8), 4.C.2(d), 4.C.3(a),(b); Reporting Program and Program Effectiveness Evaluation: 4.I.1; 3.E.1(e); Special Studies: 4.E.III.3(a)(1)(D-E); Attachment F, Section F, Part 4.E.IV.4; Part 4.E.III.2(c)(3)-(4); Watershed Initiative Participation: Part 4.B; Vehicle and Equipment Wash Areas: Part 4.G.1.3(a); and Illicit Connection/Illicit Discharge Elimination: Part 4.H.1.3(a).

County of Ventura and Ventura County Watershed Protection District, Claimants

By making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on September 29, 2021 at Sacramento, California.



Jill L. Magee  
Commission on State Mandates  
980 Ninth Street, Suite 300  
Sacramento, CA 95814  
(916) 323-3562

# COMMISSION ON STATE MANDATES

## Mailing List

**Last Updated:** 9/15/21

**Claim Number:** 11-TC-01

**Matter:** California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2010-0108

**Claimants:** County of Ventura  
Ventura County Watershed Protection District

### TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

**Adaoha Agu**, *County of San Diego Auditor & Controller Department*

Projects, Revenue and Grants Accounting, 5530 Overland Avenue, Ste. 410 , MS:O-53, San Diego, CA 92123

Phone: (858) 694-2129

Adaoha.Agu@sdcounty.ca.gov

**Arne Anselm**, *Ventura County Watershed Protection District*

800 S Victoria Ave, Ventura, CA 93009

Phone: (805) 662-6882

arne.anselm@ventura.org

**Lili Apgar**, *Specialist, State Controller's Office*

Local Reimbursements Section, 3301 C Street, Suite 740, Sacramento, CA 95816

Phone: (916) 324-0254

lappgar@sco.ca.gov

**Socorro Aquino**, *State Controller's Office*

Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816

Phone: (916) 322-7522

SAquino@sco.ca.gov

**Shanda Beltran**, *General Counsel, Building Industry Legal Defense Foundation*

Building Association of Southern California, 17744 Sky Park Circle, Suite 170, Irvine, CA 92614

Phone: (949) 553-9500

sbeltran@biasec.org

**Cindy Black**, *City Clerk, City of St. Helena*

1480 Main Street, St. Helena, CA 94574

Phone: (707) 968-2742  
ctzafopoulos@cityofsthelena.org

**Allan Burdick,**  
7525 Myrtle Vista Avenue, Sacramento, CA 95831  
Phone: (916) 203-3608  
allanburdick@gmail.com

**Guy Burdick,** Consultant, *MGT Consulting*  
2251 Harvard Street, Suite 134, Sacramento, CA 95815  
Phone: (916) 833-7775  
gburdick@mgtconsulting.com

**J. Bradley Burgess,** *MGT of America*  
895 La Sierra Drive, Sacramento, CA 95864  
Phone: (916) 595-2646  
Bburgess@mgtamer.com

**Jeffrey Burgh,** Auditor Controller, *County of Ventura*  
**Claimant Contact**  
Ventura County Watershed Protection District, 800 S. Victoria Avenue, Ventura, CA 93009-1540  
Phone: (805) 654-3151  
jeff.burgh@ventura.org

**Evelyn Calderon-Yee,** Bureau Chief, *State Controller's Office*  
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740,  
Sacramento, CA 95816  
Phone: (916) 324-5919  
ECalderonYee@sco.ca.gov

**Annette Chinn,** *Cost Recovery Systems, Inc.*  
705-2 East Bidwell Street, #294, Folsom, CA 95630  
Phone: (916) 939-7901  
achinnrcs@aol.com

**Carolyn Chu,** Senior Fiscal and Policy Analyst, *Legislative Analyst's Office*  
925 L Street, Suite 1000, Sacramento, CA 95814  
Phone: (916) 319-8326  
Carolyn.Chu@lao.ca.gov

**Michael Coleman,** *Coleman Advisory Services*  
2217 Isle Royale Lane, Davis, CA 95616  
Phone: (530) 758-3952  
coleman@muni1.com

**Kris Cook,** Assistant Program Budget Manager, *Department of Finance*  
915 L Street, 10th Floor, Sacramento, CA 95814  
Phone: (916) 445-3274  
Kris.Cook@dof.ca.gov

**Theresa Dunham,** *Kahn, Soares & Conway, LLP*  
**Claimant Representative**  
1415 L Street, Suite 400, Sacramento, CA 95814  
Phone: (916) 448-3826  
tdunham@kscsacramento.com

**Eric Feller,** *Commission on State Mandates*  
980 9th Street, Suite 300, Sacramento, CA 95814



Phone: (916) 323-3562  
eric.feller@csm.ca.gov

**Donna Ferebee**, *Department of Finance*  
915 L Street, Suite 1280, Sacramento, CA 95814  
Phone: (916) 445-3274  
donna.ferebee@dof.ca.gov

**Jennifer Fordyce**, Assistant Chief Counsel, *State Water Resources Control Board*  
Office of Chief Counsel, 1001 I Street, 22nd floor, Sacramento, CA 95814  
Phone: (916) 324-6682  
Jennifer.Fordyce@waterboards.ca.gov

**Sophie Froelich**, Attorney III, *State Water Resources Control Board*  
1001 I Street, 22nd Floor, Sacramento, CA 95812  
Phone: (916) 319-8557  
Sophie.Froelich@waterboards.ca.gov

**Susan Geanacou**, *Department of Finance*  
915 L Street, Suite 1280, Sacramento, CA 95814  
Phone: (916) 445-3274  
susan.geanacou@dof.ca.gov

**Dillon Gibbons**, Legislative Representative, *California Special Districts Association*  
1112 I Street Bridge, Suite 200, Sacramento, CA 95814  
Phone: (916) 442-7887  
dillong@csda.net

**Catherine George Hagan**, Senior Staff Counsel, *State Water Resources Control Board*  
c/o San Diego Regional Water Quality Control Board, 2375 Northside Drive, Suite 100, San Diego,  
CA 92108  
Phone: (619) 521-3012  
catherine.hagan@waterboards.ca.gov

**Heather Halsey**, Executive Director, *Commission on State Mandates*  
980 9th Street, Suite 300, Sacramento, CA 95814  
Phone: (916) 323-3562  
heather.halsey@csm.ca.gov

**Sunny Han**, Project Manager, *City of Huntington Beach*  
2000 Main Street, Huntington Beach, CA 92648  
Phone: (714) 536-5907  
Sunny.han@surfcity-hb.org

**Chris Hill**, Principal Program Budget Analyst, *Department of Finance*  
Local Government Unit, 915 L Street, Sacramento, CA 95814  
Phone: (916) 445-3274  
Chris.Hill@dof.ca.gov

**Tiffany Hoang**, Associate Accounting Analyst, *State Controller's Office*  
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740,  
Sacramento, CA 95816  
Phone: (916) 323-1127  
THoang@sco.ca.gov

**Jason Jennings**, Director, *Maximus Consulting*  
Financial Services, 808 Moorefield Park Drive, Suite 205, Richmond, VA 23236

Phone: (804) 323-3535  
SB90@maximus.com

**Angelo Joseph**, Supervisor, *State Controller's Office*  
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740,  
Sacramento, CA 95816  
Phone: (916) 323-0706  
AJoseph@sco.ca.gov

**Anita Kerezsi**, *AK & Company*  
2425 Golden Hill Road, Suite 106, Paso Robles, CA 93446  
Phone: (805) 239-7994  
akcompanysb90@gmail.com

**Joanne Kessler**, Fiscal Specialist, *City of Newport Beach*  
Revenue Division, 100 Civic Center Drive, Newport Beach, CA 90266  
Phone: (949) 644-3199  
jkessler@newportbeachca.gov

**Lisa Kurokawa**, Bureau Chief for Audits, *State Controller's Office*  
Compliance Audits Bureau, 3301 C Street, Suite 700, Sacramento, CA 95816  
Phone: (916) 327-3138  
lkurokawa@sco.ca.gov

**Michael Lauffer**, Chief Counsel, *State Water Resources Control Board*  
1001 I Street, 22nd Floor, Sacramento, CA 95814-2828  
Phone: (916) 341-5183  
michael.lauffer@waterboards.ca.gov

**Kim-Anh Le**, Deputy Controller, *County of San Mateo*  
555 County Center, 4th Floor, Redwood City, CA 94063  
Phone: (650) 599-1104  
kle@smcgov.org

**Alison Leary**, Deputy General Counsel, *League of California Cities*  
1400 K Street, Suite 400, Sacramento, CA 95814  
Phone: (916) 658-8200  
aleary@cacities.org

**Fernando Lemus**, Principal Accountant - Auditor, *County of Los Angeles*  
Auditor-Controller's Office, 500 West Temple Street, Room 603, Los Angeles, CA 90012  
Phone: (213) 974-0324  
flemus@auditor.lacounty.gov

**Erika Li**, Chief Deputy Director, *Department of Finance*  
915 L Street, 10th Floor, Sacramento, CA 95814  
Phone: (916) 445-3274  
erika.li@dof.ca.gov

**Everett Luc**, Accounting Administrator I, Specialist, *State Controller's Office*  
3301 C Street, Suite 740, Sacramento, CA 95816  
Phone: (916) 323-0766  
ELuc@sco.ca.gov

**Jill Magee**, Program Analyst, *Commission on State Mandates*  
980 9th Street, Suite 300, Sacramento, CA 95814  
Phone: (916) 323-3562  
Jill.Magee@csm.ca.gov

**Corrie Manning**, Assistant General Counsel, *League of California Cities*  
1400 K Street, Suite 400, Sacramento, CA 95814  
Phone: (916) 658-8200  
cmanning@cacities.org

**Darryl Mar**, Manager, *State Controller's Office*  
3301 C Street, Suite 740, Sacramento, CA 95816  
Phone: (916) 323-0706  
DMar@sco.ca.gov

**Jane McPherson**, Financial Services Director, *City of Oceanside*  
300 North Coast Highway, Oceanside, CA 92054  
Phone: (760) 435-3055  
JmcPherson@oceansideca.org

**Michelle Mendoza**, *MAXIMUS*  
17310 Red Hill Avenue, Suite 340, Irvine, CA 95403  
Phone: (949) 440-0845  
michellemendoza@maximus.com

**Lourdes Morales**, Senior Fiscal and Policy Analyst, *Legislative Analyst's Office*  
925 L Street, Suite 1000, Sacramento, CA 95814  
Phone: (916) 319-8320  
Lourdes.Morales@LAO.CA.GOV

**Marilyn Munoz**, Senior Staff Counsel, *Department of Finance*  
915 L Street, Sacramento, CA 95814  
Phone: (916) 628-6028  
Marilyn.Munoz@dof.ca.gov

**Geoffrey Neill**, Senior Legislative Analyst, Revenue & Taxation, *California State Association of Counties (CSAC)*  
1100 K Street, Suite 101, Sacramento, CA 95814  
Phone: (916) 327-7500  
gneill@counties.org

**Andy Nichols**, *Nichols Consulting*  
1857 44th Street, Sacramento, CA 95819  
Phone: (916) 455-3939  
andy@nichols-consulting.com

**Adriana Nunez**, Staff Counsel, *State Water Resources Control Board*  
1001 I Street, Sacramento, CA 95814  
Phone: (916) 322-3313  
Adriana.nunez@waterboards.ca.gov

**Patricia Pacot**, Accountant Auditor I, *County of Colusa*  
Office of Auditor-Controller, 546 Jay Street, Suite #202, Colusa, CA 95932  
Phone: (530) 458-0424  
ppacot@countyofcolusa.org

**Arthur Palkowitz**, *Artiano Shinoff*  
2488 Historic Decatur Road, Suite 200, San Diego, CA 92106  
Phone: (619) 232-3122  
apalkowitz@as7law.com

**Heather Parrish-Salinas**, Office Coordinator, *County of Solano*  
Registrar of Voters, 675 Texas Street, Suite 2600, Fairfield, CA 94533

Phone: (707) 784-3359  
HYParrishSalinas@SolanoCounty.com

**Johnnie Pina**, Legislative Policy Analyst, *League of Cities*  
1400 K Street, Suite 400, Sacramento, CA 95814  
Phone: (916) 658-8214  
jpina@cacities.org

**Jai Prasad**, *County of San Bernardino*  
Office of Auditor-Controller, 222 West Hospitality Lane, 4th Floor, San Bernardino, CA 92415-0018  
Phone: (909) 386-8854  
jai.prasad@atc.sbcounty.gov

**Jeff Pratt**, *County of Ventura*  
800 S. Victoria Avenue, Ventura, CA 93009-1600  
Phone: (805) 654-3952  
jeff.pratt@ventura.org

**Renee Purdy**, Acting Executive Officer, *Los Angeles Regional Water Quality Control Board*  
320 West 4th Street, Suite 200, Los Angeles, CA 90013-2343  
Phone: (213) 576-6686  
rpurdy@waterboards.ca.gov

**David Rice**, *State Water Resources Control Board*  
1001 I Street, 22nd Floor, Sacramento, CA 95814  
Phone: (916) 341-5161  
davidrice@waterboards.ca.gov

**Ivar Ridgeway**, *Los Angeles Regional Water Quality Control Board*  
320 West 4th Street, Suite 200, Los Angeles, CA 90013-2343  
Phone: (213) 576-6686  
iridgeway@waterboards.ca.gov

**Camille Shelton**, Chief Legal Counsel, *Commission on State Mandates*  
980 9th Street, Suite 300, Sacramento, CA 95814  
Phone: (916) 323-3562  
camille.shelton@csn.ca.gov

**Carla Shelton**, *Commission on State Mandates*  
980 9th Street, Suite 300, Sacramento, CA 95814  
Phone: (916) 323-3562  
carla.shelton@csn.ca.gov

**Glenn Shephard**, Director, *Ventura County Watershed Protection District*  
800 S Victoria Ave, Ventura, CA 93009  
Phone: (805) 662-6882  
glenn.shephard@ventura.org

**Natalie Sidarous**, Chief, *State Controller's Office*  
Local Government Programs and Services Division, 3301 C Street, Suite 740, Sacramento, CA 95816  
Phone: 916-445-8717  
NSidarous@sco.ca.gov

**Michelle Skaggs Lawrence**, City Manager, *City of Oceanside*  
300 North Coast Highway, Oceanside, CA 92054  
Phone: (760) 435-3055  
citymanager@oceansideca.org

**Christina Snider**, Senior Deputy County Counsel, *County of San Diego*  
1600 Pacific Highway, Room 355, San Diego, CA 92101  
Phone: (619) 531-6229  
Christina.Snider@sdcounty.ca.gov

**Eileen Sobeck**, Executive Director, *State Water Resources Control Board*  
1001 I Street, 22nd Floor, Sacramento, CA 95814-2828  
Phone: (916) 341-5183  
Eileen.Sobeck@waterboards.ca.gov

**Joe Stephenshaw**, Director, *Senate Budget & Fiscal Review Committee*  
California State Senate, State Capitol Room 5019, Sacramento, CA 95814  
Phone: (916) 651-4103  
Joe.Stephenshaw@sen.ca.gov

**Brittany Thompson**, Budget Analyst, *Department of Finance*  
Local Government Unit, 915 L Street, Sacramento, CA 95814  
Phone: (916) 445-3274  
Brittany.Thompson@dof.ca.gov

**Jolene Tollenaar**, *MGT Consulting Group*  
2251 Harvard Street, Suite 134, Sacramento, CA 95815  
Phone: (916) 243-8913  
jolenetollenaar@gmail.com

**Evelyn Tseng**, *City of Newport Beach*  
100 Civic Center Drive, Newport Beach, CA 92660  
Phone: (949) 644-3127  
etseng@newportbeachca.gov

**Brian Uhler**, Principal Fiscal & Policy Analyst, *Legislative Analyst's Office*  
925 L Street, Suite 1000, Sacramento, CA 95814  
Phone: (916) 319-8328  
Brian.Uhler@LAO.CA.GOV

**Antonio Velasco**, Revenue Auditor, *City of Newport Beach*  
100 Civic Center Drive, Newport Beach, CA 92660  
Phone: (949) 644-3143  
avelasco@newportbeachca.gov

**Emel Wadhvani**, Senior Staff Counsel, *State Water Resources Control Board*  
Office of Chief Counsel, 1001 I Street, Sacramento, CA 95814  
Phone: (916) 322-3622  
emel.wadhvani@waterboards.ca.gov

**Ada Waelder**, Legislative Analyst, Government Finance and Administration, *California State Association of Counties (CSAC)*  
1100 K Street, Suite 101, Sacramento, CA 95814  
Phone: (916) 327-7500  
awaelder@counties.org

**Renee Wellhouse**, *David Wellhouse & Associates, Inc.*  
3609 Bradshaw Road, H-382, Sacramento, CA 95927  
Phone: (916) 797-4883  
dwa-renee@surewest.net

**Jacqueline Wong-Hernandez**, Deputy Executive Director for Legislative Affairs, *California State Association of Counties (CSAC)*

1100 K Street, Sacramento, CA 95814  
Phone: (916) 650-8104  
jwong-hernandez@counties.org

**Hasmik Yaghobyan**, *County of Los Angeles*  
Auditor-Controller's Office, 500 W. Temple Street, Room 603, Los Angeles, CA 90012  
Phone: (213) 974-9653  
hyaghobyan@auditor.lacounty.gov